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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

AGUA CALIENTE BAND OF
CAHUILLA INDIANS,

Plaintiff,
and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

COACHELLA VALLEY WATER
DISTRICT, et al.,

Defendants.

CASE NO. 5:13-cv-00883-JGB-SP

United States' Notice of Motion,
Motion, and Memorandum of
Points and Authorities in Support
of Motion to Reconsider the
Court's April 19, 2019 Order.

BEFORE: Judge Jesus G. Bernal
HEARING: August 19, 2019

NOTICE OF MOTION AND MOTION TO RECONSIDER ORDER

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on August 19, 2019, at 9:00 a.m., or as
4 soon thereafter as the matter may be heard, in the Courtroom of the
5 Honorable Jesus G. Bernal, at the United States District Court for the
6 Central District of California, located at 3470 Twelfth Street, Riverside,
7 California 92501, and pursuant to Rule 54(b) of the Federal Rules of
8 Civil Procedure, and Rule 7-18, subsection (c), of the Local Rules of the
9 Central District of California, the United States intends to move, and
10 hereby does move, for the Court to reconsider its April 19, 2019 order in
11 this case.

12 This motion is based on the attached Memorandum of Points and
13 Authorities in support of the motion, on the exhibits attached thereto,
14 on the attached Proposed Order, on all other pleadings and papers on
15 file in this case, and on such other and further arguments, documents,
16 and grounds as may be advanced in the future. This motion is also
17 made following the conference of counsel pursuant to L.R. 7-3, which
18 took place on July 9, 2019.

Dated: July 16, 2019

Respectfully submitted,

/s/ Yosef M. Negose

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TABLE OF CONTENTS

2	TABLE OF AUTHORITIES	ii
3	MEMORANDUM OF POINTS AND AUTHORITIES.....	1
4	LEGAL STANDARD	1
5	ARGUMENT.....	2
6	I. The Court's April 19 order overlooked facts that support the	
7	plaintiffs' standing	2
8	A. The Court overlooked facts in the record that establish that	
9	the defendants charge fees to utilize the plaintiffs' right	2
10	B. The Court overlooked facts in the record that establish that	
11	the defendants have forced the Tribe into an injurious	
12	dilemma	6
13	C. The Court overlooked that the record establishes that the	
14	defendants have disparaged federal title	11
15	II. The April 19 standing ruling misapplied law to the facts that it	
16	considered	14
17	A. The April 19 standing ruling implied that the plaintiffs lost	
18	standing in Phase II because they prevailed in Phase I	15
19	B. The April 19 standing ruling misinterpreted an out-of-	
20	circuit, takings decision that actually supports the plaintiffs'	
21	standing in this case	17
22	C. The April 19 standing ruling threatens absurd results	19
23	III. The Court wrongly faulted the United States for not presenting	
24	evidence.....	21
25	A. The United States proffers evidence	22
26	B. The United States' proffer shows that the Agua Caliente	
27	Reservation needs at least 33,000 acre-feet per year.....	23
28	CONCLUSION	25

TABLE OF AUTHORITIES

Federal Cases

<i>Aqua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.</i> , 849 F.3d 1262 (9th Cir. 2017)	9, 10
<i>Arizona v. California</i> , 460 U.S. 605 (1983)	8
<i>Arizona v. San Carlos Apache Tribe of Arizona</i> , 463 U.S. 545 (1983)	17, 21
<i>Avista Corp. Inc. v. Wolfe</i> , 549 F.3d 1239 (9th Cir. 2008)	13
<i>Barnes-Wallace v. City of San Diego</i> , 530 F.3d 776 (9th Cir. 2008)	10
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976)	21
<i>Center for Biological Diversity v. United States Forest Serv.</i> , No. 17-15790, 2019 WL 2293425 (9th Cir. May 30, 2019)	13
<i>City of Los Angeles v. Santa Monica Bay Keeper</i> , 254 F.3d 882 (9th Cir. 2001)	1
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013)	18
<i>Cobell v. Jewell</i> , 802 F.3d 12 (D.C. Cir. 2015)	1
<i>Colquitt v. Roxana Petroleum Corp.</i> , 49 F.2d 1025 (5th Cir. 1931)	12
<i>Colville Confederated Tribes v. Walton</i> , 460 F. Supp. 1320 (E.D. Wash. 1978)	21
<i>Colville Confederated Tribes v. Walton</i> , 647 F.2d 42 (9th Cir. 1981)	21
<i>Conrad Inv. Co. v. United States</i> , 161 F. 829 (9th Cir. 1908)	8, 20
<i>Credit Suisse First Boston Corp. v. Grunwald</i> , 400 F.3d 1119 (9th Cir. 2005)	1
<i>Crow Creek Sioux Tribe v. United States</i> , 132 Fed. Cl. 408 (2017)	17
<i>Crow Creek Sioux Tribe v. United States</i> , 900 F.3d 1350 (Fed. Cir. 2018)	17, 18
<i>De Anda v. City of Long Beach</i> , 7 F.3d 1418 (9th Cir. 1993)	22
<i>Drumm v. Morningstar, Inc.</i> , No. C08-3362 TEH, 2009 WL 3246741 (N.D. Cal. Oct. 8, 2009)	23
<i>Drumm v. Morningstar, Inc.</i> , 416 F. App'x 606 (9th Cir. 2011)	23
<i>Joel Alcox v. The City of Lompoc, et al</i> , 2018 WL 6113077 (C.D. Cal. July 26, 2018)	1
<i>Kirola v. City & Cnty. of San Francisco</i> , 860 F.3d 1164 (9th Cir. 2017)	21

1	<i>Lamar Advert. of Mobile, Inc. v. City of Lakeland, Fla.</i> , 189 F.R.D. 480 (M.D. Fla. 1999)	2
2	<i>Laub v. U.S. Department of Interior</i> , 342 F.3d 1080 (9th Cir. 2003)....	10
3	<i>Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation</i> , 425 U.S. 463 (1976)	5
4	<i>Nebraska v. Iowa</i> , 143 U.S. 359 (1892)	17
5	<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945)	7
6	<i>Network Signatures, Inc. v. ABN-AMRO, Inc.</i> , No. SACV 06-629 JVS (RNBx), 2007 WL 7601871 (C.D. Cal. Apr. 10, 2007)	1
7	<i>New Mexico v. Dep't of Interior</i> , 854 F.3d 1207 (10th Cir. 2017).....	9
8	<i>Pyramid Lake Paiute Tribe of Indians v. Nevada, Dep't of Wildlife</i> , 724 F.3d 1181 (9th Cir. 2013)	10, 11
9	<i>Robinson v. United States</i> , 586 F.3d 683 (9th Cir. 2009)	13
10	<i>San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior</i> , 905 F. Supp. 2d 1158 (E.D. Cal. 2012).....	10, 16
11	<i>Sanitary Dist. of Chicago v. United States</i> , 266 U.S. 405 (1925)	10
12	<i>Saqui v. Pride Cent. Am., LLC</i> , 595 F.3d 206 (5th Cir. 2010)	2
13	<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016)	13
14	<i>United States v. \$53,020.00 in U.S. Currency</i> , No. CIV. 09-2533 PJS/JJG, 2011 WL 2116418 (D. Minn. Apr. 13, 2011)	16
15	<i>United States v. Adair</i> , 723 F.2d 1394 (9th Cir. 1983)	21
16	<i>United States v. Ahtanum Irr. Dist.</i> , 236 F.2d 321 (9th Cir. 1956) .	20, 25
17	<i>United States v. Anderson</i> , 736 F.2d 1358 (9th Cir. 1984).....	5
18	<i>United States v. California</i> , 332 U.S. 19 (1947)	13
19	<i>United States v. Gray</i> , 201 F. 291 (8th Cir. 1912)	6, 14
20	<i>United States v. King</i> , 660 F.3d 1071 (9th Cir. 2011)	9
21	<i>United States v. Lewisburg Area Sch. Dist.</i> , 539 F.2d 301 (3d Cir. 1976)	5
22	<i>United States v. Mattson</i> , 600 F.2d 1295 (9th Cir. 1979).....	14
23	<i>United States v. Nevada & California</i> , 412 U.S. 534 (1973)	14
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28	<i>Zamora v. Dep't of Homeland Sec.</i> , No. CIV. S-07-023RRBEFB, 2008 WL 1767028 (E.D. Cal. Apr. 16, 2008)	23

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3 992 (Ct. App. 1975)	10

4 **Federal Statutes**

5 <i>Indians</i> , 25 U.S.C. § 415(a)	5
6 <i>Judiciary and Judicial Procedure</i> , 28 U.S.C. § 1345.....	21
7 28 U.S.C. §§ 516.....	19
8 28 U.S.C. §§ 519.....	19

9 **State Statutes**

10 Cal. Water Code § 10720.3	10
11 Cal. Water Code § 31047	12
12 Cal. Water Code Appx. § 100-15	12

13 **Federal Rules**

14 Fed. R. Evid. 103.....	1
15 Fed. R. Evid. 103(a)	23
16 Fed. R. Civ. P. 54	2
17 Fed. R. Civ. P. 54(b).....	1, 2
18 Fed. R. Civ. P. 56(c)	23
19 Fed. R. Civ. P. 59	2
20 Fed. R. Civ. P. 59(e)	2
21 Fed. R. Civ. P. 60(b).....	2

21 **Federal Regulations**

22 <i>Indians</i> , 25 C.F.R. § 1.4	5
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24 Providing for the Leasing by Indian Owners of Restricted Indian Lands, H.R. Rep. No. 1093, 84 th Cong., 1st Sess. 1 (1955)	5
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5	Resources L. Rev. 89 (2016)	20
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The United States urges the Court to reconsider its April 19, 2019
 3 ruling that the United States and Agua Caliente Band of Cahuilla
 4 Indians (“Tribe”) lack standing to seek declaration of their disputed
 5 federal reserved water rights in this quiet title-type case. In particular,
 6 the United States urges the Court to reconsider its ruling on the
 7 plaintiffs’ standing for three reasons. First, the ruling failed to consider
 8 material facts that support the plaintiffs’ standing. Second, the ruling
 9 misapplied standing doctrine and reached the wrong conclusion. Third,
 10 the Court did not allow the United States to present evidence
 11 concerning the scope of its water rights claims, pertinent to the Court’s
 12 standing analysis, which the United States now proffers.¹

13 **LEGAL STANDARD**

14 Courts have broad power to reconsider interlocutory orders. *Credit*
Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1124 (9th Cir.
 15 2005); *City of Los Angeles v. Santa Monica Bay Keeper*, 254 F.3d 882,
 16 885 (9th Cir. 2001). Neither the Federal Rules of Civil Procedure
 17 (“FRCP”) nor Local Rules limit this power. *City of Los Angeles*, 254 F.3d
 18 at 887; *Joel Alcox v. The City of Lompoc, et al*, 2018 WL 6113077, at *2
 19 (C.D. Cal. July 26, 2018); *see Network Signatures, Inc. v. ABN-AMRO,*
 20 *Inc.*, No. SACV 06-629 JVS (RNBx), 2007 WL 7601871 (C.D. Cal. Apr.
 21 10, 2007) (court can reconsider interlocutory ruling on standing even if
 22 the strictures of Local Rule 7-18 have not been met). FRCP 54(b)’s
 23 “approach to the interlocutory presentation of new arguments” provides
 24 a procedural vehicle through which parties can invoke a court’s power
 25 to reconsider. *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015). And

27
 28 ¹ Part III.B. of the Argument section of this brief proffers excluded evidence
 pursuant to F.R.E. 103.

1 Central District of California Local Rule 7-18, subsection (c), provides
2 that a motion for reconsideration may be made on the ground that there
3 has been a “manifest failure to consider material facts presented to the
4 Court []” before the decision in question issued.²

5 **ARGUMENT**

6 **I. The Court’s April 19 order overlooked facts that support the
7 plaintiffs’ standing.**

8 The Court’s April 19 order overlooked material facts that support
9 the plaintiffs’ standing. In particular, the order overlooked that the
10 defendants are charging lessees money to utilize the Agua Caliente
11 water right that the plaintiffs seek to quantify. Additionally, the order
12 overlooked that the defendants — by pumping water from the Tribe’s
13 overdrafted water supply — have forced the tribe into a dilemma that is
14 an injury-in-fact for standing purposes. The order also overlooked that
15 the defendants dispute that the United States and Tribe possess any
16 reserved right to groundwater, and that this dispute over federal real
17 property injures the plaintiffs and gives them standing to seek
18 declaratory relief in a quiet title-type action. These are all reasons to
19 reconsider the standing ruling.

20 **A. The Court overlooked facts in the record that establish that the
21 defendants charge fees to utilize the plaintiffs’ right.**

22
23 ² The Motion is timely; this Court has authority under Rule 54 to reconsider and
24 revise its orders free of any timing and jurisdictional constraints pertaining to
25 amendment of a judgment under Rules 59(e) or 60(b). *See Fed. R. Civ. P. 54(b)* (an
26 order “that adjudicates fewer than all the claims or the rights and liabilities of
27 fewer than all the parties does not end the action as to any of the claims or parties
28 and may be revised *at any time before the entry of a judgment.*”) (emphasis added);
Saqui v. Pride Cent. Am., LLC, 595 F.3d 206, 210-11 (5th Cir. 2010) (no time
restriction); *Lamar Advert. of Mobile, Inc. v. City of Lakeland, Fla.*, 189 F.R.D. 480,
492 (M.D. Fla. 1999) (distinguishing Rules 54 and 59). No local rule imposes a time
limit on motions for reconsideration.

1 Facts in the record establish that the defendants interfere with
2 use of the right that the plaintiffs seek to quantify, by imposing fees on
3 commercial leaseholders who pump groundwater beneath their
4 leasehold interests. *See Krieger Decl.* (Dkt. 246-1) at 3-5, ¶¶ 6-10
5 (describing groundwater pumping on trust land); *Court's Phase I*
6 *Summary Judgment Order* (Dkt. 116) at 4 (“Some non-Indian lessees
7 who occupy reservation territory do produce groundwater for their
8 use—specifically to water golf courses.”); *Preckwinkle v. Coachella*
9 *Valley Water Dist.*, No. 5:05-cv-00626-VAP, Dkt. 210 (C.D. Cal. Aug. 30,
10 2011) (Dkt. 85-2, Exhibit A in this case) at 16 (explaining that “since
11 1980, [CVWD] has mailed invoices for replenishment assessments to
12 [lessees] based on the pumping of water from the wells on... allotted
13 land.”); *id.* (explaining that “[r]epresentatives of [CVWD] have
14 entered... allotted land on a regular basis to read the meters on the
15 three wells and determine the amount of the assessment.”). Facts in the
16 record also establish that the defendants base the fees that they impose
17 on “the volume of water” that parties pump on trust land. *See id.* at 16.
18 These facts are material to the plaintiffs’ standing to quantify the
19 “volume of water” that is subject to the reserved water right that is at
20 issue in this case. *See id.* Judge Phillips’ recent *Preckwinkle* decision
21 illustrates why this is so.

22 To begin with some context, *Preckwinkle* arose when members of
23 the Tribe with allotted land discovered — during attempts to negotiate
24 terms under which a lessee could pump groundwater, utilizing a portion
25 of the Agua Caliente reserved water right — that CVWD had already
26 charged the lessee fees to utilize the right. *See id.* at 16-17, n. 6. Upon
27 learning of the fees, the members sued CVWD for “interfer[ing]” with
28 the right. *Id.* at 2, 8, 13, 38-39. CVWD responded by challenging the

1 “volume of water” that is subject to the right. *Id.* at 17. And Judge
2 Phillips refused to quantify the right at that time, because the United
3 States and Tribe were “indispensable” sovereign parties that could not
4 be joined without their consent. *See id.* at 41 (“[A]n adjudication of
5 Plaintiffs’ water rights necessarily involves a determination of the
6 entire reservation’s water rights, i.e., because Plaintiffs are entitled to a
7 ratable share of the tribe’s total practicably irrigable acreage rights, the
8 Court would have to quantify the tribe’s PIA to determine Plaintiffs’
9 ratable share.”); *see also id.* at 41-42, 44 (explaining that the United
10 States as sovereign and title-holder was an indispensable party that
11 could not have been joined without its consent).

12 Judge Phillips’ ruling that the United States and the Tribe were
13 indispensable to *Preckwinkle* supports the United States’ and Tribes’
14 standing to quantify the reserved water right in the matter before the
15 Court. As parties that were indispensable to *Preckwinkle*, the United
16 States as trustee, sovereign, and real party in interest, and the Tribe,
17 as the United States’ beneficiary, must be proper parties to request an
18 adjudication of the same issue that arose in that case. That issue was a
19 dispute with CVWD over the volume of water that is subject to the
20 Agua Caliente reserved water right. *See Preckwinkle* at 41-43, 44. That
21 issue has not been resolved, and the United States and Tribe have
22 standing to ask the Court to resolve it in this case.

23 In addition, *Preckwinkle* noted a federal regulation that exempts
24 water use on leased Indian land from state laws and state control. *See*
25 *Preckwinkle* at 50. The cited regulation³ supports the Indian Long-

26
27
28 ³ The regulation states: “[Except as otherwise provided,] none of the laws... of any
State or political subdivision thereof limiting, zoning or otherwise governing,
regulating, or controlling the use or development of any real or personal property,
including water rights, shall be applicable to any such property leased from or held

1 term Leasing Program, which generates money for tribes and their
2 members through the authorization of long-term leases.⁴ See 25 U.S.C.
3 § 415(a) (authorizing Secretary of the Interior to approve long-term
4 leases of restricted Indian lands); H.R. REP. NO. 1093, 84th Cong., 1st
5 Sess. 1 (1955) (explaining that a major purpose behind the
6 authorization of long-term leases is to generate money for Indians). Yet
7 the defendants flout the regulation and interfere with the program by
8 imposing fees.

9 Since the defendants' fees are based on the volume of water
10 pumped on trust land, the United States and the Tribe have standing to
11 quantify the reserved water right, which is the necessary first step in
12 determining whether fees are owed to the defendants. See *Moe v.*
13 *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425
14 U.S. 463, 474, n.7, n.13 (1976) (United States would have standing to
15 enjoin the collection of state taxes from Indians living on an Indian
16 reservation.); *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301,
17 305-06 (3d Cir. 1976) (injury to the U.S. when inferior governments
18

19 or used under agreement with and belonging to any Indian or Indian tribe, band, or
20 community that is held in trust by the United States or is subject to a restriction
against alienation imposed by the United States." 25 C.F.R. § 1.4 (emphasis added).

21 ⁴ Federal reserved water rights that are part of leasehold interests in land support
the Indian Long-term Leasing Program because they typically have senior priority
dates, making them "more valuable than the rights of competing water users." See
22 *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984); Dkt. 116 at 10 n.7
("the full quantity of water available to the Indian allottee...may be conveyed to the
23 non-Indian purchaser... which logic surely translates to lessees."); see also Reid
Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial*
24 *Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1065 (1974)
("Indian water rights are valuable to the lessees because they carry a priority as of
the date the reservation was established... rather than the date the lease is made or
25 the date appropriation of the water commences...Moreover, the measure of the
Indian water right is any water that can be put to beneficial use either now or in
the future.").

charge beneficiaries of federal programs on federal lands); *United States v. Gray*, 201 F. 291, 293 (8th Cir. 1912) (United States has standing to enforce the property rights that underlie leases of Indian lands, because the funds derived from leased Indian lands support the governmental policy of the United States).

B. The Court overlooked facts in the record that establish that the defendants have forced the Tribe into an injurious dilemma.

The record also establishes that the defendants' pumping has resulted in an "overdraft" of the groundwater, which means that the defendants' pumping has greatly exceeded the sum of the natural and artificial recharge of the available sub-basins. *See CVWD Phase II Motion for Summary Judgment* (Dkt. 200) at 5 ("In 2016, CVWD and DWA jointly provided approximately 108,251 af of drinking water to domestic residents, commercial facilities, and resort developments in the Valley, and CVWD provided 342,000 af to local farms for irrigation."); *Bureau of Indian Affairs letter to Coachella Valley Water District*, dated October 26, 2007 (Dkt. 289-11) at 6-9 (warning the defendants to consider how overdraft impacts federal trust assets). As a result, the Reservation's water supply is approximately 90 vertical feet lower. *See Krieger and Stewart Report* (Dkt. 289-15) at 20 ("[C]urrent estimates for cumulative reductions of groundwater in storage between 1936 and 2013 are 628,690 AF in the Whitewater River Subbasin and approximately 3,929 AF in the Garnet Hill Subbasin, which combine to 632,501 AF, rounded to 633,000 AF, within the two subbasins,); id. ("The reduction of groundwater in storage beneath Reservation lands between the years 1936 and 2013 within the Whitewater River and Garnet Hill Subbasins... is estimated to be 80,892 AF..."); *id.* at 21 ("[A]s a worst case, if Tyley's highest possible storage coefficient for the

1 area is uniformly applied beneath Reservation lands to determine the
2 total change in storage beneath Reservation lands, the maximum
3 reduction in groundwater in storage would be 146,130 AF...”); *id.* at 22
4 (“Within the Whitewater River Subbasin, the maximum decline in
5 water levels since 1936 is approximately 90 feet per DWA and CVWD
6 2013 groundwater level data.”).⁵ These facts are material to the
7 plaintiffs’ standing to quantify the Agua Caliente reserved water right
8 for two reasons.

9 First, parties have standing to quantify competing water rights
10 when water resources are insufficient to meet the existing claims
11 against them. *See Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945)
12 (“deprivation of water in arid or semiarid regions cannot help but be
13 injurious,” especially when there is “inadequacy of the supply of water”
14 to meet the competing claims against it.); *id.* (“[W]here the claims to the
15 water of a river exceed the supply a controversy exists appropriate for
16 judicial determination.”); *id.* (“[W]here there is not enough water in [a
17 water source] to satisfy the claims asserted against it, the situation is
18 not basically different from that where two or more persons claim the
19 right to the same parcel of land. The... clash of interests [is] of that
20 character... which makes the controversy a justiciable one...”). And
21 here, even without accounting for the Agua Caliente reserved water

22
23 ⁵ Facts in the record establish that the defendants have tried to “partially offset”
24 their “cumulative overdraft” of the Reservation’s groundwater supply by importing
25 Colorado River water at an aquifer recharge facility. Dkt. 318 at 15. But the right-
26 of-way across federal lands on which the defendants operate the recharge facility
27 has expired, and the defendants have historically exceeded the right of way, and
28 have been deemed in trespass in the past. *See Declaration of Brandon G. Anderson*
(Dkt. 211-2) at 3-26. The defendants have not disputed these facts since the United
States brought them to the Court’s attention in 2017. And the facts are material to
the plaintiffs’ standing, because they call into question the reliability of the
defendants’ recharge program.

right — which, as set forth in Part III.B. of the Argument section of this brief, the United States estimates as encompassing at least 33,000 acre-feet per year, approximately the full natural recharge of the Indio sub-basin — the existence of the overdraft condition conclusively establishes that the Agua Caliente Reservation’s water resources are insufficient to meet the existing claims against them.

Second, when, as here, an Indian Reservation’s water supply is insufficient to meet the existing claims against it, non-Indian uses deplete the supply and change its natural character. This exceeds the non-Indians’ usufruct, which is limited to beneficial use of “the excess over the amount of water” that tribes presently and prospectively need.

See Conrad Inv. Co. v. United States, 161 F. 829, 832 (9th Cir. 1908) (“Having determined that the Indians on the reservation have a paramount right to the waters of Birch Creek, it follows that the permission given to the defendant to have the *excess* over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification.”) (emphasis added); *see also Arizona v. California*, 460 U.S. 605, 620-21 (1983) (explaining that where water is scarce, and there is “no surplus,” competitive consumption causes a “gallon-for-gallon” reduction in the available supply); L.F.E. Goldie, *Title and Use (and Usufruct) -an Ancient Distinction Too Oft Forgot*, 79 Am. J. Int'l L. 689, 691–92 (1985) (“Usufructus [is] the right to enjoy the property of another and to take the fruits, but not to destroy it, or fundamentally alter its character. . . . [It] is the right of using and taking the fruits of property belonging to another... without the right of destroying or changing the character of the thing, and lasting only so long as the character remains unchanged.”). And this exceedance of the usufruct

1 harms tribes, because it forces them into an injurious dilemma. This
2 case illustrates how.

3 Here, the defendants — by pumping water from the Tribe’s
4 overdrafted water supply — have made it impossible for the Tribe to
5 use any water without worsening the existing depletion of the available
6 water supply. There is no surplus; there is no excess from which to
7 pump. There is only a deficit: currently at 90-feet below the natural
8 level. And this deficit, coupled with the government defendants’
9 continued over-pumping, forces the Tribe into the following dilemma:

- 10
- 11 • If the tribe chooses to spend money to dig its own wells, using
12 and marketing water in order to compete with the defendants,
13 then it risks triggering a tragedy of the commons by
14 exacerbating the water deficit.
 - 15 • If the Tribe chooses to try to preserve what remains of the water
16 supply, then the Tribe must purchase water to which it has a
17 right from the defendants.⁶

18 This dilemma is a classic “forced choice” injury under Article III.
19 See *New Mexico v. Dep’t of Interior*, 854 F.3d 1207, 1218 (10th Cir.
20 2017) (explaining that a party is actionably injured for Article III
21 standing purposes when it is “forc[ed]... to choose between participating

22 ⁶ In a way, the Tribe is currently being compelled into this second option. The
23 groundwater resource is valuable. See *United States v. King*, 660 F.3d 1071, 1080
24 (9th Cir. 2011) (explaining many reasons why “water is an economic commodity”
25 and an “article of commerce”). Thus, the Tribe has strong reasons to preserve it. Yet
26 the Tribe must use water. So rather than participating in the water’s depletion, the
27 Tribe pays the defendant for deliveries, though the Tribe disputes the defendants’
28 legal authority to pump and deliver. See *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1266 (9th Cir. 2017) (“[The Tribe] purchases groundwater from [the defendants].”); *Court’s Phase I Summary Judgment Order* (Dkt. 116) at 4 (the Tribe and allottees “purchase their water from [the defendants].”).

1 in a process it considers unlawful and forgoing any benefit from that
2 allegedly unlawful process."); *Barnes-Wallace v. City of San Diego*, 530
3 F.3d 776, 785 (9th Cir. 2008) (forced choice injury where "the plaintiffs
4 [were] faced with the choice of not using Camp Balboa and the Aquatic
5 Center, which they wish to use, or making their family excursions
6 under the dominion of an organization that openly rejects their
7 beliefs...").

8 The defendants' pumping, coupled with the absence of surplus,
9 establishes an injurious dilemma and clear standing to sue the
10 defendants to determine competing rights to the overdrafted water
11 supply. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley*
12 *Water Dist.*, 849 F.3d 1262, 1271 (9th Cir. 2017) ("If the United States
13 can protect against groundwater diversions, it follows that the
14 government can protect the groundwater itself."); *Tehachapi-Cummings*
15 *Cnty. Water Dist., v. Armstrong*, 49 Cal. App. 3d 992, 998 (Ct. App.
16 1975) ("[T]he right of overlying owners to a judgment declaring their
17 water rights and protecting them in the prospective beneficial use is
18 clear even though substantial present damage is not shown."); Cal.
19 Water Code § 10720.3 ("In an adjudication of rights to the use of
20 groundwater, and in the management of a groundwater basin...
21 federally reserved water rights to groundwater *shall be respected in*
22 *full...* This subdivision is declaratory of existing law.") (emphasis
23 added).⁷

24 ⁷ *See also Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425 (1925)
25 (United States had standing to enjoin withdrawal of water from Lake Michigan in
26 excess of that authorized by the Secretary of War); *San Luis & Delta-Mendota*
27 *Water Auth. v. U.S. Dep't of the Interior*, 905 F. Supp. 2d 1158, 1171 (E.D. Cal.
28 2012) (the "risk that water allocations would be reduced in the future as a result of
government water accounting decisions" is an actionable injury for Article III
standing purposes); *Laub v. U.S. Department of Interior*, 342 F.3d 1080, 1086 (9th
Cir. 2003) ("Loss of affordable irrigation water" is actionable); *Pyramid Lake Paiute*

1 **C. The Court overlooked that the record establishes that the**
2 **defendants have disparaged federal title.**

3 The record establishes that long before federal intervention in this
4 case, the defendants contested aspects of federal title to the Reservation
5 and the associated federal reserved water right. *See CVWD Answer to*
6 *Tribe's Complaint* (Dkt. 39) at 13, 15, 20-21 (claiming that the
7 Reservation is burdened with a “public servitude,” that its pore space is
8 a “public resource,” and that federal law does not protect its water
9 supply). The defendants also have told this court, the Ninth Circuit, and
10 the Supreme Court that there is no federal reserved water right in
11 groundwater. *See, e.g., Desert Water Agency Petition for Writ of*
12 *Certiorari in This Matter*, 2017 WL 2889284 at *34-*36 (July 3, 2017)
13 (section titled “THE TRIBE DOES NOT HAVE A RESERVED RIGHT
14 IN GROUNDWATER.”) (format in original).

15 The defendants have not relinquished their arguments; this
16 conflict is ongoing. *See* CVWD arguments in February 28, 2019 Tr.
17 (Dkt. 314) at 51:10-13 (“the Tribe achieved an important victory, *one*
18 *that we dispute*, having to do with *whether they have Winters rights to*
19 *begin with*”) (emphasis added); *id.* at 23:24-25, 24:1-4 (“If [the Tribe]
20 started pumping out tons and tons of water and say our client said,
21 gosh, that water absolutely exceeds the native safe yield – that’s so
22 much more water they could have impliedly granted by the federal
23 government. This is ridiculous. We could file suit . . .”); *id.* at 63:19-20
24 (“It’s our water. We’re paying for it.”). The defendants even now contend
25 that they have unlimited power to “distribute, store, spread, sink, treat,

26
27
28

Tribe of Indians v. Nevada, Dep’t of Wildlife, 724 F.3d 1181, 1188 (9th Cir. 2013)
(reduction of a tribe’s water supply is actionable).

1 purify, recapture and salvage” all of the water in the Coachella Valley.
2 See Cal. Water Code § 31047; Cal Water Code Appx. § 100-15.

3 These public claims that the defendants have made in Court
4 documents actionably harm the United States’ property interests and
5 provide standing for the Court to adjudicate and declare the respective
6 rights to groundwater as to the parties in a quiet title-like action.⁸ And
7 the standing of the United States and the Tribe is even stronger than it
8 would be in a normal adjudication of relative water rights because
9 defendants also claim exclusive rights to the recharge water that they
10 use to ostensibly offset overdraft. *See CVWD Answer to Tribe’s
11 Complaint* (Dkt. 39) at 16 (“CVWD and DWA have the paramount
12 rights and interests in Colorado River water that they import into the
13 Coachella Valley and recharge into the groundwater subbasins therein
14 in order to provide water supplies for their customers, including the
15 paramount right to recapture all such water so imported and
16 recharged... Therefore, the Tribe does not have any rights or interests
17 in the imported Colorado River water.”).

18 Notably, this Court’s April 19 order recognized that the plaintiffs’
19 claims in this case are “in purpose and effect like a quiet title action[.]”
20 Dkt. 318 at 13-14. Yet the order failed to appreciate that in a quiet title
21 action, the assertion of a right, title or interest in disputed property
22 establishes standing to seek declaratory relief. 74 C.J.S. Quieting Title
23 § 68 (“A real party in interest with standing to bring an action to quiet
24 title is one who has a real, material, or substantial interest in the
25 subject matter of the action... The required interest for standing is that

26 _____
27 ⁸ See *Colquitt v. Roxana Petroleum Corp.*, 49 F.2d 1025, 1026 (5th Cir. 1931)
28 (explaining that proceedings in a state court, and the recording of documents that
threatened to set aside leases created a “cloud on title” that gave a federal court
equitable jurisdiction to relieve aggrieved lessees).

1 which would enable acquiring an interest created by the court's
2 judgment or decree."); *see also Avista Corp. Inc. v. Wolfe*, 549 F.3d
3 1239, 1246 n.6 (9th Cir. 2008) ("Avista's assertion of an ownership
4 interest... provides it with standing to bring a quiet title and
5 declaratory judgment action."); *Utah ex rel. Division of Forestry, Fire &*
6 *State Lands v. United States*, 528 F.3d 712, 722 (10th Cir. 2008) ("[T]he
7 adverse interests asserted by Utah and the Clingers to the property
8 between the meander lines are sufficient to establish Utah's standing.").

9 This standard traces back to the English common law, which for
10 centuries has protected those with interests in real property from
11 "annoyance" and harassment by "persons setting up unjust and illegal
12 pretensions" about disputed property rights. 74 C.J.S. Quieting Title §
13 2; *see Robinson v. United States*, 586 F.3d 683, 687 (9th Cir. 2009)
14 (noting the common-law origins of quiet title actions).⁹

15 This time-tested rule that property owners can seek declaratory
16 relief from hostile claims applies with special force to federal property
17 disputes and means that an adverse claim is itself sufficient to
18 demonstrate an injury for standing purposes. *See, e.g., United States v.*
19 *California*, 332 U.S. 19, 25 (1947) (explaining that Article III permits
20 courts to hear and resolve conflicting federal and state claims of rights

21

22 ⁹ *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Because the doctrine
23 of standing derives from the case-or-controversy requirement, and because that
24 requirement in turn is grounded in historical practice, it is instructive to consider
25 whether an alleged intangible harm has a close relationship to a harm that has
26 traditionally been regarded as providing a basis for a lawsuit in English or
27 American courts."); *Ctr. for Biological Diversity v. United States Forest Serv.*, No.
28 17-15790, 2019 WL 2293425, at *5 (9th Cir. May 30, 2019) (a party presents a
justiciable dispute (as opposed to a request for an advisory opinion) when the case
presents "an honest and actual antagonistic assertion of rights by one party against
another," and "valuable legal rights would be directly affected to a specific and
substantial degree by a decision from the court.").

1 to use and authorize use of oil beneath federal property); *United States*
2 v. *Oregon*, 295 U.S. 1, 25 (1935) (explaining that the “possession of the
3 United States, under color and claim of title... is an adequate basis for
4 relief in equity to remove the cloud created by the assertion of any
5 inferior title of the state.”).

6 The United States, as sovereign, has a unique authority to seek
7 relief when the public interest is affected, and in particular has long
8 been recognized as having standing to protect its property interests in
9 federal courts. *See, e.g.*, *United States v. Mattson*, 600 F.2d 1295, 1298-
10 99 (9th Cir. 1979) (explaining that courts have recognized the
11 government’s standing to sue regarding property rights since the
12 1800s); *United States v. Gray*, 201 F. 291, 294–95 (8th Cir. 1912) (the
13 United States has standing to sue to protect or enforce any property
14 right under the control and supervision of the Secretary of the Interior
15 because such suits are necessary to protect and enforce the
16 governmental rights of the United States.); *see also United States v.*
17 *Nevada & California*, 412 U.S. 534, 536-540 (1973) (Where water levels
18 in a lake that was the water supply for an Indian Reservation, were
19 alleged “to have declined some 70 feet” due to non-Indian use, the
20 dispute over “the existence and extent of the prior water rights of the
21 United States with respect to the... Reservation [was] within the
22 jurisdiction of the District Court[;];” and “[a]ny possible dispute with
23 California with respect to [the United States’] water uses in that State
24 [could] be settled in the lower federal courts in California.”).

25 **II. The April 19 standing ruling misapplied law to the facts that it
26 considered.**

27 The Court’s April 19 standing ruling misapplied the law in at least
28 three ways. First, the ruling implied that the plaintiffs’ Phase I victory

1 deprived the United States of part of its standing to seek declaration of
2 the right that it seeks to quantify. Second, the ruling incorrectly relied
3 on an out-of-circuit, takings decision that actually supports the
4 plaintiffs' standing in this case. Third, the standing ruling threatens
5 absurd results. These are all reasons to reconsider the standing ruling.

6 **A. The April 19 standing ruling implied that the plaintiffs lost
7 standing in Phase II because they prevailed in Phase I.**

8 Count I of the United States' complaint sought declaration,
9 including quantification, of a *Winters* right. Dkt. 71 at 8, 10. No party
10 to this case has ever questioned the United States' standing to press
11 Count I as a whole.¹⁰ In Phase I, this Court and the Ninth Circuit ruled
12 that the right in Count I exists. In Phase II, the defendants challenged
13 the United States' standing to ask the Court to declare anything more
14 than the mere existence of the right in Count I.¹¹ Now, the Court has

15

16 ¹⁰ “Defendants admit the Court has jurisdiction over the claims in the Complaint in
17 Intervention pursuant to 28 U.S.C. [§ 1345.]” Doc. 73 at 2 (emphasis added). “The
18 district court had jurisdiction over plaintiff-intervenor United States’ Complaint in
19 Intervention under 28 U.S.C. [§ 1345.]” Joint Br. of Appellants, No. 15-55896 (9th
20 Cir. Oct. 9, 2015) at 1 (emphasis added). “Petitioner Coachella Valley Water
21 District (“CVWD”) has never argued, and does not argue now, that the Tribe lacks
22 standing to press its claim that it possesses a federal reserved right to the
23 groundwater underlying its reservation for use on its tribal lands. To the contrary,
24 CVWD readily admits that the Tribe has standing to press that claim” Supp.
25 Br. of Petitioners, No. 17-40, 2017 WL 5171480 (U.S.), at *1 (Nov. 6, 2017)
26 (emphasis added). “[T]he Tribe claims an immediate, ongoing injury from CVWD’s
continued withdrawal of groundwater from the aquifer, and CVWD has never
suggested that the Tribe lacks standing to press it.” *Id.* at *3. “DWA acknowledges
that the Tribe has standing to assert that it has a reserved right in groundwater,
which includes quantification of the right.” Dkt. 216 at 19 n.8 (emphasis added);
see id. (“DWA does not challenge the United States’ standing . . . to adjudicate and
quantify the United States’ reserved water rights claims . . . ”) (internal quotations
omitted).

27 ¹¹ Phase II of this case was about affirmative defenses, not standing; the defendants
28 confused the issues by conflating Phase II and the plaintiffs’ claims. *See Order
dated June 9, 2015* (Dkt. 121) at 2 (explaining that “the Court will permit discovery,

1 held that the plaintiffs lack standing to obtain part of the declaratory
2 relief that the United States seeks in Count I. Ostensibly, the United
3 States lacks standing because the Tribe did not utilize the right in
4 Count I as soon as the Court declared the right to exist in Phase I. *See*
5 Dkt. 318 at 14, 21.

6 This analysis is incorrect. “Standing is determined by the facts
7 that exist at the time the complaint is filed.” *See San Luis & Delta-*
8 *Mendota Water Auth.*, 905 F. Supp. 2d at 1169. And “there is no such
9 concept” as “partial standing.” *United States v. \$53,020.00 in U.S.*
10 *Currency*, No. CIV. 09-2533 PJS/JHG, 2011 WL 2116418, at *2 (D.
11 Minn. Apr. 13, 2011). A litigant has complete “Article III standing as
12 long as he can show a sufficient ownership interest in the property to
13 create a case or controversy capable of federal judicial resolution.” *Id.*
14 Count I of the plaintiff’s complaint articulates such an interest: a
15 federal reserved water right. And the question of whether the Court
16 should declare the quantity of that right goes to the merits of the
17 plaintiff’s claims, and the relief that the plaintiff seeks, not standing.
18 *See id.* (“The United States has conflated Article III standing with the
19 merits of Brown’s claim. By arguing that Brown has Article III standing
20 as to only \$6000.00, the United States is essentially asserting that
21 Brown has only ‘partial standing.’ But there is no such concept.”). The
22 court already found a case or controversy sufficient for standing in
23 Phase I and declared that the Reservation has a federal reserved water

24 solely on the equitable defenses” in Phase II.); Dkt. 150 at n.4 (explaining in Phase
25 II that “[t]he instant motions concern only the applicability of Defendants’ equitable
26 defenses to Plaintiffs’ claims for declaratory relief...”); *see also* Dkt. 246 at 15-16
27 (DWA’s arguments regarding “the Tribe’s standing to bring its Phase 2 claims”);
Dkt. 246-3 at 2 (same); Dkt. 247 at 27 and 32 (CVWD’s arguments regarding “Phase
28 2 claims”); Dkt. 281 at 5 (same); Dkt. 287 at 6 (DWA’s arguments regarding Tribe’s
“injury on its Phase 2 claims”); Dkt. 301 at 5 (DWA arguments regarding Tribe’s
standing as to its “Phase 2 claims”).

right. That the parties entered Phase II to address the defendants' affirmative defenses does not provide the court an opportunity to effectively split Count I into two parts.

**4 B. The April 19 standing ruling misinterpreted an out-of-circuit,
5 takings decision that actually supports the plaintiffs' standing
6 in this case.**

The Court's April 19 ruling that the plaintiffs lacked standing cited the Federal Circuit's opinion in *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1356 (Fed. Cir. 2018). See Dkt. 318 at 13 ("The Federal Circuit, considering a similar issue, reached the same conclusion."). Yet the *Crow Creek* opinion never questioned the "powerful federal interest" in "safeguarding [Indian water] rights from [non-Indian] encroachment." See *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). In fact, *Crow Creek* recognized that the government can enjoin non-Indians from diverting water away from Indian reservations. *Crow Creek*, 900 F.3d at 1356 (citing *Winters v. United States*, 207 U.S. 564, 577 (1908)). This basic point of law supports the United States' standing to enjoin the defendants from diverting water away from the Indian Reservation in this case.

Moreover, *Crow Creek* did not address groundwater overdraft or a situation in which water was scarce. On the contrary, it addressed Missouri River water so abundant that "flood control" was necessary. *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408, 411 (2017), aff'd, 900 F.3d 1350 (Fed. Cir. 2018).¹² Nor did *Crow Creek* address

¹² See A. Dan Tarlock, *The Missouri River: The Paradox of Conflict Without Scarcity*, 2 Great Plains Nat. Resources J. 1, 2 (1997) (explaining that the Missouri River has "seventy-three million acre-feet, the largest amount of water stored on any United States river system"); *Nebraska v. Iowa*, 143 U.S. 359, 368 (1892) ("The large volume of water pouring down [the Missouri River,] with the rapidity of its current, has great and rapid action upon the loose soil of its banks.").

1 standing to seek a quiet title-like action. The case concerned an alleged
2 Fifth Amendment taking: a constitutional violation. *Crow Creek*, 900
3 F.3d at 1356. This Court and the Supreme Court have recognized the
4 need for an “especially rigorous” standing inquiry in cases that involve
5 alleged constitutional violations by the political branches of
6 government. Dkt. 318 at 9 (quoting *Clapper v. Amnesty Int'l USA*, 568
7 U.S. 398, 408 (2013)). Such a rigorous inquiry does not apply to the
8 property dispute that is presently before the Court: quantification of a
9 federal reserved water right. Neither the Court of Federal Claims nor
10 the Federal Circuit are the appropriate forum to quantify reserved
11 water rights. And *Crow Creek*’s holding that a claimant cannot prevail
12 on a Fifth Amendment taking of property, if that party cannot delineate
13 a claim to a particular interest in property, should have no bearing on
14 the outcome of this case.

15 Furthermore, the fundamental dispute in *Crow Creek* was
16 whether the government had breached a “fiduciary duty” by “failing to
17 protect, quantify, assert or record” a federal reserved water right. 900
18 F.3d at 1353. On this central point, the United States’ brief in *Crow*
19 *Creek* explained why there would be jurisdiction if, instead of a
20 damages action by the tribe, the United States had brought an action in
21 federal district court for the quantification of the federal reserved
22 *Winters* right at issue.

23 In particular, the United States explained that (1) unlike its Court
24 of Federal Claims case, the tribe could have had a portion of its claims
25 “redressed . . . by a quantification of the Tribe’s water rights”; (2)
26 quantifying federal reserved water rights “can be conclusively
27 accomplished . . . through the filing of an action . . . in a “federal *district*
28 court”; and (3) “the decision to file a claim in court, including a water

rights claim on behalf of an Indian tribe, is squarely within the discretion of the Department of Justice.” Brief of the United States, *Crow Creek Sioux Tribe v. United States*, No 17-2340 (Dec. 20, 2017) at 20-21 (citing 28 U.S.C. §§ 516, 519) (emphasis in original) (attached hereto as Exhibit A). *Crow Creek*, therefore, stands for the unsurprising proposition that a party cannot seek to adjudicate its water right in the first instance in the Court of Federal Claims in a takings context, particularly where it is undisputed that there is more than enough water in the basin for all reasonable claims.

In light of all of these points, the Federal Circuit’s ruling on the tribe’s takings claim for damages in *Crow Creek* does not support the Court’s standing ruling as to the plaintiffs here, where there is a dispute between the parties as to a federal reserved right, as well as its quantity, and there is water shortage that manifests itself through significant overdraft. In fact, the United States’ arguments in *Crow Creek* show why an action in federal district court for the quantification of federal reserved water rights is the appropriate path forward.

C. The April 19 standing ruling threatens absurd results.

“[T]o satisfy the injury-in-fact requirement for standing to quantify its *Winters* right,” the Court concluded in the April 19 ruling, “the Tribe must provide evidence that [the defendants’] actions actually or imminently harm the Tribe’s ability to use sufficient water to fulfill the purposes of the reservation.” Dkt. 318 at 14. To meet this requirement, plaintiffs must effectively establish a present ability to utilize a water right before a court can quantify the *Winters* right. This unprecedented standard threatens the absurd consequence that Indian tribes with unquantified *Winters* rights cannot quantify those rights — establishing in the only conclusive way available the amount of water

1 that is sufficient to fulfill the purposes of the Reservation — until they
2 can first show that they are not able to access sufficient water. *Contra*
3 *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956)
4 (“At the time of the making of the treaty construed in the *Winters* case,
5 it is plain there was little or no irrigation then being carried on by the
6 Indians.... No one even thought in the *Winters* case that the rights of
7 the Indians to the use of the water reserved should be limited to the
8 quantities used at the date of the treaty. The implied reservation looked
9 to the needs of the Indians in the future when they would change their
10 nomadic habits and become accustomed to tilling the soil.”); *Conrad Inv.*
11 *Co.*, 161 F. at 32 (affirming decree of federal right to existing uses, and
12 retaining jurisdiction to account for reservation’s future needs).

13 Many tribes, due to lack of funding and economic development on
14 reservations, “have not had their *Winters* rights quantified, and are not
15 using large portions of the water they are likely entitled to under the
16 law.” Julia Guarino, *Protecting Traditional Water Resources: Legal*
17 *Options for Preserving Tribal Non-Consumptive Water Use*, 37 Pub.
18 Land & Resources L. Rev. 89, 95 (2016). Yet the Catch-22 created by the
19 Court’s ruling would put these tribes in the untenable position of
20 having to guess the amounts of water “sufficient [] to fulfill the
21 purposes” of their reservations, and having to invest scarce resources in
22 expensive infrastructure to develop unknown quanta of water before
23 they could have standing to litigate the scope of their rights. *See* Dkt.
24 318 at 14.¹³

25 _____
26 ¹³ The logic of the April 19 ruling would play into the hands of parties like the
27 defendants who have claimed that failure to previously develop federal reserved
28 water rights precludes their assertion. *See, e.g.*, *CVWD Equitable Defenses Brief*
(Dkt. 140) at 7 (“In the Laches defenses, all defendants allege that plaintiff or
plaintiff intervenor has not previously attempted to establish a reserved right to

1 This rule would be unworkable and analytically backwards. Tribes
2 and the United States should not have to utilize or prove harms to their
3 property rights before federal courts will resolve conflicting claims to
4 water rights. *See Kirola v. City & Cnty. of San Francisco*, 860 F.3d
5 1164, 1175 (9th Cir. 2017) (explaining that standing doctrine does not
6 require litigants to prove their claims before they can litigate them). To
7 date, federal courts have uniformly recognized federal courts' subject-
8 matter jurisdiction over water adjudications premised on conflicting
9 claims and 28 U.S.C. § 1345.¹⁴ The Court should not depart from this
10 precedent. It should instead reconsider its April 19 standing ruling.

11 **III. The Court wrongly faulted the United States for not presenting
12 evidence.**

13 The Court's April 19 standing ruling faults the United States for
14 failing to "provide evidence of harm to the Tribe's federally reserved
15 right." Dkt. 318 at 21. Yet the Court never gave the United States an
16 opportunity to submit any such evidence. Rather, consistent with the
17 focus of Phase II (affirmative defenses), the Court restricted claims and
18 factual discovery concerning quantification and a possible violation of
19 the U.S.'s right to Phase III. *Order dated June 9, 2015* (Dkt. 121) at 2
20

21 groundwater and that in the meantime many users have acquired rights to water
under California law....).

22 ¹⁴ See, e.g., *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 559 (1983)
23 ("At the outset of our analysis, a number of propositions are clear. First, the federal
24 courts had jurisdiction here to hear the suits brought both by the United States and
the Indian Tribes."); *Cappaert v. United States*, 426 U.S. 128, 135 (1976) ("[F]ederal
25 courts have jurisdiction under 28 U.S.C. § 1345 to adjudicate the water rights
claims of the United States"); *United States v. Adair*, 723 F.2d 1394, 1400 (9th Cir.
26 1983) ("Plainly, the district court had jurisdiction... under 28 U.S.C. § 1345 . . . to
adjudicate the water rights claims of the United States."); *Colville Confederated
27 Tribes v. Walton*, 460 F. Supp. 1320, 1323 (E.D. Wash. 1978) (28 U.S.C. § 1345
provides jurisdiction to determine reserved water rights for the Colville Indian
28 Reservation) *rev'd. in part and aff'd. in part*, 647 F.2d 42 (9th Cir. 1981).

1 n.2. The Court also repeatedly prohibited submissions, and warned
2 parties not to deviate from the Court's orders.¹⁵

3 Eventually, the Court gave every party except the United States
4 an opportunity to conduct limited discovery on points that the Court
5 told the United States not to address until Phase III. *Compare Order*
6 *dated June 9, 2015* (Dkt. 121) at 2 n.2 (explaining that "factual
7 discovery concerning the standard and possible violation of a water
8 quality component" would "be addressed in Phase III") *with Order*
9 *dated Aug. 1, 2018* (Dkt. 267) (allowing the Defendants and the Tribe to
10 depose one expert per side, and to conduct limited factual discovery on
11 violation of the right the Tribe claimed). The Court denied the United
12 States this opportunity, and the Court's phasing order prevented the
13 United States from presenting evidence of its claims in Phase II. Yet
14 the Court's April 19 order faults the United States for failing to discover
15 and present its evidence out of turn.

16 **A. The United States proffers evidence.**

17 By faulting the United States for not presenting evidence out of
18 turn, the Court has violated the Ninth Circuit's decades-old prohibition
19 against prejudicial trifurcation of claims that are based on a single
20 theory of recovery. *See De Anda v. City of Long Beach*, 7 F.3d 1418,
21 1420 (9th Cir. 1993) (holding that district courts are not permitted to

22

23 ¹⁵ *See April 26, 2018 Tr.* (Dkt. 241) at 57:5-6 ("I will not permit any additional
24 briefing unless I direct you to brief."); *Id.* at 57:10-13 ("And, again, no further
25 briefing on any of the issues unless, when I go back and review the briefing, I find
26 that something else needs to be further explained."); *Order Dated August 1, 2018*
27 (Dkt. 266) at 6 (court reminding the parties that it would "not permit additional
28 briefing," and "warn[ing] the parties [against] any future failure to comply with the
Court's orders"); *February 28, 2019 Tr.* (Dkt. 314) at 68:5-6 ("[I]f I need anything
else from you, I'll let you know. No submissions unless I authorize them."); Dkt. 318
at 4 n. 3 ("The Court acknowledges that the United States was not invited to submit
any supplemental briefing.").

1 trifurcate adjudication of claims that are based on a single theory of
2 recovery if doing so prejudices a plaintiff's ability to submit evidence.).

3 By deferring presentation and discovery regarding the United
4 States' rights to Phase III, then ruling on summary judgment that the
5 United States lacks standing because it could not prove harms to its
6 rights in Phase II, the Court denied the United States the opportunity
7 to submit evidence concerning the scope of its claims and the harms to
8 those claims that the court appears to consider relevant to the United
9 States' standing. *See Wilderness Soc'y v. Griles*, 824 F.2d 4, 19 (D.C.
10 Cir. 1987) (explaining that a district court abused its discretion by
11 denying a plaintiff discovery of facts that supported standing, then
12 ruling on summary judgment that the party lacked standing); *see also*
13 FRCP 56(c) (1) (contemplating the existence of "materials in the record,
14 including depositions, documents, electronically stored information,
15 affidavits or declarations, stipulations... or other materials" before
16 parties move for summary judgment).

17 These procedural irregularities are manifestly unjust to the
18 United States,¹⁶ and compel the United States to proffer excluded
19 evidence of its federal reserved water right claim in this case. Pursuant
20 to F.R.E. 103(a), the United States proffers the attached declaration of
21 Assad Safadi (Exhibit B).

22 **B. The United States' proffer shows that the Agua Caliente
23 Reservation needs at least 33,000 acre-feet per year.**

24
25
26 ¹⁶ Courts in the Ninth Circuit have broad authority to reconsider to correct or
27 prevent manifest injustice. *See, e.g., Drumm v. Morningstar, Inc.*, No. C08-3362
TEH, 2009 WL 3246741, at *1 (N.D. Cal. Oct. 8, 2009), *aff'd*, 416 F. App'x 606 (9th
Cir. 2011); *Zamora v. Dep't of Homeland Sec.*, No. CIV. S-07-023RRBEBF, 2008 WL
1767028, at *2 (E.D. Cal. Apr. 16, 2008).

1 The proffer shows that the United States at this time claims that
2 the Agua Caliente Indian Reservation needs at least 33,000 acre-feet of
3 water per year to fully effectuate its primary purpose as a home for an
4 agrarian society. The majority of this water, over 26,000 acre-feet per
5 year, is necessary to irrigate historically and practicably irrigable
6 acreage on the reservation, thus fulfilling the agrarian purpose of the
7 reservation. The total estimate also encompasses over 7,000 acre-feet to
8 serve estimated domestic, commercial, municipal and industrial
9 purposes on the reservation, thus fulfilling the homeland purpose of the
10 reservation.

11 Other methodologies and approaches to quantification might yield
12 different figures, but these figures represent the United States' current
13 understanding based on years of research and analysis. The details of
14 the United States' final reserved water rights claims, however, may be
15 subject to change as these claims are further analyzed and refined.

16 Although the undisputed record demonstrates plaintiffs' Article
17 III standing, the proffered evidence further highlights the
18 incompatibility of the defendants' continued conduct and the Agua
19 Caliente Reservation, and is pertinent to the Court's view of what is
20 required to demonstrate standing. Specifically, if the defendants are
21 correct in asserting that "the natural sustainable yield of the Indio
22 Subbasin... averages roughly 26,300 af per annum," then the proffered
23 evidence shows that the United States claims more than the entire
24 sustainable yield of the Indio Subbasin for the Agua Caliente
25 Reservation as the Tribe's federal reserved water right. *See* CVWD's
26 Phase II Motion for Summary Judgment (Dkt. 200) at 4.¹⁷ None of this

27 ¹⁷ The United States disputes the defendants' natural sustainable yield figures and
28 submits that the sustainable yield is over 30,000 acre-feet per year. *See Exhibit B* at
16.

water is available for private use under present conditions. *See Ahtanum Irr. Dist.*, 236 F.2d at 340 (“No portion of that volume of water or of the right to the use thereof, [is] open to appropriation or other acquisition under state law by the defendants or their predecessors in interest.”). Thus, the proffered evidence, which the Court prevented the plaintiff from filing in Phase II, demonstrates that there is not enough water available to satisfy the needs of both the Tribe and the defendants.

CONCLUSION

The Court’s April 19, 2019 order overlooked material facts, misapplied law to the facts that it considered, and faulted the United States for not submitting evidence that the Court told the United States not to submit. Thus, the United States respectfully urges the Court to reconsider the April 19 order.

July 16, 2019

Respectfully submitted,

/s/ Yosef M. Negose

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 16, 2019, a true and correct copy of
3 the foregoing was served on all counsel of record via the Court's
4 Electronic Case Filing System.

5
6 _____
7 /s/ Yosef Mulugeta Negose
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No. 17-2340

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CROW CREEK SIOUX TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS, CASE
NO. 1:16-CV-00760 (HON. ROBERT H. HODGES)

RESPONSE BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Table of Contents.....	ii
Table of Authorities	iv
Statement of Related Cases.....	ix
Introduction	1
Statement of Jurisdiction.....	2
Statement of the Issues.....	2
Statement of the Case	3
A. Federal Reserved Water Rights	3
B. The Crow Creek Sioux Reservation and the Pick-Sloan Project	6
C. Court of Federal Claims Proceedings	8
Summary of Argument	10
Standard of Review	11
Argument.....	12
I. The Tribe Does Not Present an Article III Case or Controversy.	12
A. The Tribe Has Not Alleged Any Actual or Imminent Injury to Its Right to Use Missouri River Water to Accomplish the Purpose of Its Reservation.	14
B. The Tribe's Requested Relief Cannot Redress Any Alleged Injury.	19
II. The Tribe's Claims Are Barred by the Statute of Limitations.	21
A. The Tribe's Breach-of-Trust Claim Accrued No Later than 1964.	22

B.	The Tribe's Takings Claim Accrued No Later Than 1964.....	25
III.	The Tribe Has Not Identified a Money-Mandating Statute That Could Support Jurisdiction Over Its Breach-of-Trust Claim.	26
A.	Jurisdictional Requirements for a Breach-of-Trust Claim.	26
B.	Section 162a(d)(8) Does Not Establish a Specific Fiduciary Duty Regarding the Management of Water or Water Rights.....	28
1.	Section 162a(d)(8) Lacks the Specific Rights-Creating or Duty-Imposing Terms to Support Indian Tucker Act Jurisdiction.	28
2.	No Court Has Held that Section 162a(d)(8) Creates a Specific Fiduciary Duty as to Water Rights or Any Other Natural Resource.	35
C.	Even If Section 162a(d)(8) Creates a Specific Fiduciary Duty, It Does Not Mandate Compensation for Breach of Those Duties.....	38
	Conclusion.....	40

TABLE OF AUTHORITIES

Cases

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967)	13
<i>Anderson v. United States</i> , 344 F.3d 1343 (Fed. Cir. 2003)	12
<i>Ariadne Financial Services Pty. Ltd. v. United States</i> , 133 F.3d 874 (Fed. Cir. 1998)	25
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	1, 4, 16
<i>Arizona v. California</i> , 376 U.S. 340 (1964)	16
<i>Arizona v. San Carlos Apache Tribe of Arizona</i> , 463 U.S. 545 (1983)	4, 6
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	11, 16
<i>Boling v. United States</i> , 220 F.3d 1365 (Fed. Cir. 2000)	25, 26
<i>Brown Park Estates-Fairfield Development Co. v. United States</i> , 127 F.3d 1449 (Fed. Cir. 1997)	25
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976)	4
<i>Casitas Mun. Water District v. United States</i> , 708 F.3d 1340 (Fed. Cir. 2013) ...	3, 15, 18, 19
<i>Casitas Municipal Water District v. United States</i> , 543 F.3d 1276 (Fed. Cir. 2008)	18
<i>Cobell v. Babbitt</i> , 30 F. Supp. 2d 24 (D.D.C. 1998)	36
<i>Crow Creek Sioux Tribe v. United States</i> , 132 Fed. Cl. 408 (2017)	8
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006)	12
<i>Davis v. FEC</i> , 554 U.S. 724 (2008)	12
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963)	19
<i>Duncan v. United States</i> , 667 F.2d 36 (Ct. Cl. 1981)	30
<i>El Paso Natural Gas Co. v. United States</i> , 750 F.3d 863 (D.C. Cir. 2014)	31
<i>Estate of Hage v. United States</i> , 687 F.3d 1281 (Fed. Cir. 2012)	26
<i>Evans v. United States</i> , 107 Fed. Cl. 442 (2012)	36

<i>Fallini v. United States</i> , 56 F.3d 1378 (Fed. Cir. 1995)	22
<i>Federal Power Comm'n v. Niagara Mohawk Power Corp.</i> , 347 U.S. 239 (1954).....	3
<i>Fisher v. United States</i> , 402 F.3d 1167 (Fed. Cir. 2005)	37, 38
<i>Franklin v. Massachusetts</i> , 505 U.S. 788 (1992)	21
<i>Gila River Pima-Maricopa Indian Community v. United States</i> , 695 F.2d 559 (Fed. Cir. 1982)	15
<i>Hopi Tribe v. United States</i> , 782 F.3d 662, 666 (Fed. Cir. 2015).....	passim
<i>In re General Adjudication of All Rights to Use Water in Gila River System & Source</i> , 989 P.2d 739 (Ariz. 1999).....	5
<i>In re General Adjudication of All Rights to Use Water in Gila River System & Source</i> , 35 P.3d 68 (Ariz. 2001).....	5
<i>Jicarilla Apache Nation v. United States</i> , 100 Fed. Cl. 737 (2011).....	30, 36
<i>John R. Sand & Gravel Co. v. United States</i> , 552 U.S. 130 (2008).....	21
<i>Lion Raisins, Inc. v. United States</i> , 416 F.3d 1356 (Fed. Cir. 2005)	12
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	16
<i>Martinez v. United States</i> , 333 F.3d 1295 (Fed. Cir. 2003)	24
<i>Menominee Indian Tribe v. United States</i> , 136 S. Ct. 750 (2016)	34
<i>Menominee Tribe of Indians v. United States</i> , 726 F.2d 718 (Fed. Cir. 1984)	24
<i>National Park Hospitality Ass'n v. Dep't of Interior</i> , 538 U.S. 803 (2003)	13
<i>Navajo Nation v. United States</i> , 631 F.3d 1268 (Fed. Cir. 2011)	23
<i>Navajo Tribe of Indians v. United States</i> , 624 F.2d 981 (Ct. Cl. 1980).....	30
<i>New Mexico v. Trujillo</i> , 813 F.3d 1308 (10th Cir. 2016)	5
<i>Osage Tribe of Indians of Okla. v. United States</i> , 93 Fed. Cl. 1 (2010)	36
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986).....	17
<i>Parks v. Cooper</i> , 676 N.W.2d 823 (S.D. 2004)	3

<i>Pennsylvania Dep’t of Corrections v. Yesky</i> , 524 U.S. 206 (1998)	32
<i>Prasco, LLC v. Medicis Pharm. Corp.</i> , 537 F.3d 1329 (Fed. Cir. 2008)	13
<i>Pyramid Lake Paiute Tribe of Indians v. Morton</i> , 354 F. Supp. 252 (D.D.C. 1972).....	34
<i>Rincon Band of Mission Indians v. Escondido Mutual Water Co.</i> , 459 F.2d 1082 (9th Cir. 1972)	21
<i>San Carlos Apache Tribe v. United States</i> , 639 F.3d 1346 (Fed. Cir. 2011)	21, 22, 23
<i>Shinnecock Indian Nation v. United States</i> , 782 F.3d 1345 (Fed. Cir. 2015)	13
<i>Shoshone Bannock Tribes v. Reno</i> , 56 F.3d 1476 (D.C. Cir. 1995)	21
<i>Shoshone Indian Tribe of the Wind River Reservation v. United States</i> , 364 F.3d 1339 (Fed. Cir. 2004).....	22, 37
<i>Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.</i> , 549 U.S. 422 (2007)	11
<i>SmithKline Beecham Corp. v. Apotex Corp.</i> , 439 F.3d 1312 (Fed. Cir. 2006).....	8
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016)	passim
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998)	19
<i>Summers v. Earth Island Institute</i> , 555 U.S. 488 (2009)	14
<i>Susan B. Anthony List v. Driehaus</i> , 134 S. Ct. 2334 (2014)	13
<i>Thomas v. Anchorage Equal Rights Comm’n</i> , 220 F.3d 1134 (9th Cir. 2000)	13
<i>Tulare Lake Basin Water Storage District v. United States</i> , 49 Fed. Cl. 313 (2001)	19
<i>United States v. Adair</i> , 723 F.2d 1394 (9th Cir. 1984)	4
<i>United States v. Jicarilla Apache Nation</i> , 564 U.S. 162 (2011)	27, 28, 31, 34
<i>United States v. Klamath Water Users Protective Association</i> , 532 U.S. 1 (2001)	32
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980).....	27, 33
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983).....	passim
<i>United States v. Navajo Nation</i> , 537 U.S. 488 (2003)	passim

<i>United States v. Navajo Nation</i> , 556 U.S. 287 (2009)	passim
<i>United States v. Tohono O’Odham Nation</i> , 563 U.S. 307 (2011).....	20
<i>United States v. White Mountain Apache Tribe</i> , 537 U.S. 465 (2003).....	26, 28
<i>Warth v. Seldin</i> , 422 U.S. 490, 518 (1975).....	12, 17
<i>Washoe County v. United States</i> , 319 F.3d 1320 (Fed. Cir. 2003).....	15
<i>Welcker v. United States</i> , 752 F.2d 1577 (Fed. Cir. 1985)	24
<i>Winters v. United States</i> , 207 U.S. 564 (1908)	1, 3, 4

Statutes

25 U.S.C. § 1505	26
25 U.S.C. § 162a.....	passim
28 U.S.C. § 1295(a)(3)	2
28 U.S.C. § 1362	5
28 U.S.C. § 1491(a)(1)	2, 26
28 U.S.C. § 1505	2
28 U.S.C. § 2501	2, 10, 21
28 U.S.C. § 516.....	20
28 U.S.C. § 519.....	20
Act of June 28, 1938, ch. 795, 52 Stat. 1215	6
Act of Dec. 22, 1944, ch. 665, 58 Stat. 887	7
Act of Mar. 2, 1889, ch. 405, § 6, 25 Stat. 888	6
Pub. L. No. 85-916, § 1, 72 Stat. 1766 (1958)	7
Pub. L. No. 87-735, § 1(a)(2), 76 Stat. 704 (1962).....	7
Pub. L. No. 104-223, § 2(a)(7), 110 Stat. 3026 (1996)	7

Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, tit. IV, 124 Stat. 3064.....6

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Rules

Fed. R. App. P. 4(a)(1)(B)2

STATEMENT OF RELATED CASES

Counsel for the United States is aware of no previous appeals in this action and no related cases that will directly affect or be affected by this court's decision in this case.

INTRODUCTION

Under federal law, the establishment of an Indian Reservation—whether by treaty, statute, or executive order—impliedly reserves water sufficient to fulfill the purposes of that reservation. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 597-602 (1963). In this case, Plaintiff Crow Creek Sioux Tribe (“Tribe”) alleges that the United States effected a taking of, and breached a fiduciary duty to protect, water reserved to accomplish the purposes of the Tribe’s Reservation. The Tribe’s claims stem from the construction of two dams on the Missouri River between 1946 and 1952 as part of the Pick-Sloan Plan, which the Tribe alleges resulted in the diversion, sale, and retention of its water in violation of its water rights. The Tribe further alleges that 25 U.S.C. § 162a(d)(8), which includes “appropriately managing the natural resources located within the boundaries of Indian reservations” among a list of the United States’ trust responsibilities, establishes an enforceable duty to manage the Tribe’s water rights. The Tribe alleges that the operation of the Pick-Sloan dams, as well as other unspecified acts and omissions of the United States, have resulted in a breach of that duty. The Tribe seeks at least \$200 million in damages, as well as declaratory and injunctive relief.

As explained herein, the Court of Federal Claims properly dismissed the suit for lack of jurisdiction. The Tribe’s claims fail on both standing and ripeness grounds because the Tribe has not alleged any actual or concrete injury to its water right. The Tribe’s claims should be dismissed for the additional, alternative reason that they are

barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2501, because the Tribe has been aware of the federal government's operation of the Pick-Sloan dams and any alleged impact on tribal water rights since at least 1964. Finally, the Tribe's breach-of-trust claim was properly dismissed because 25 U.S.C. § 162a(d)(8) does not establish specific fiduciary duties or mandate compensation for damages relating to the management of tribal water rights. Accordingly, the judgment of the Court of Federal Claims should be affirmed.

STATEMENT OF JURISDICTION

The Tribe brought suit against the United States and invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1) and the Indian Tucker Act, 28 U.S.C. § 1505. Appx13-14. On June 2, 2017, the Court of Federal Claims entered a final judgment dismissing the Tribe's suit for lack of jurisdiction. Appx6. On July 20, 2017, the Tribe filed a timely notice of appeal. Appx315; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the Tribe can demonstrate Article III standing to pursue its claims without pleading any facts showing that its water supply is insufficient to accomplish the purposes of the Reservation.

2. Whether the Tribe's claims are barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2501 because they accrued no later than 1964, the year of the last federal action referenced in the Complaint.
3. Whether 25 U.S.C. § 162a(d)(8) is a money-mandating statute that confers jurisdiction on the Court of Federal Claims to hear the Tribe's breach-of-trust claim.

STATEMENT OF THE CASE¹

A. Federal Reserved Water Rights

Water rights are usufructuary in nature; that is, the property right "consists not so much of the fluid itself as the advantage of its use." *Casitas Mun. Water District v. United States (Casitas II)*, 708 F.3d 1340, 1353 (Fed. Cir. 2013) (quoting *Eddy v. Simpson*, 3 Cal. 249, 252 (1853)); *see also Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246 (1954) (water rights in question "are usufructuary rights to use the water for the generation of power, as distinguished from claims to the legal ownership of the running water itself"). The water rights of most landowners and water users in the United States, including in South Dakota, are governed by state law. *See generally* S.D. Cod. L. § 46-1-3 ("all water within the state is the property of the people of the state but the right to the use of water may be acquired by appropriation as provided by

¹ Because the Tribe's suit was dismissed at the pleading stage, the following recitation of facts draws from the allegations in the Complaint. The recitation of those facts, however, does not constitute an admission of their veracity.

law”); *see also Parks v. Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) (describing South Dakota water law history).

In a series of cases commencing with *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court and other federal and state courts have held that the establishment of a federal reservation of land also implicitly reserves an amount of unappropriated water needed to accomplish the purpose of the reservation. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Arizona v. California*, 373 U.S. 546, 599-600 (1963). This doctrine extends to Indian reservations reserved by treaty, statute, or executive order as well as generally to other non-Indian federal land reservations. *See, e.g.*, 373 U.S. at 597-98; *Cappaert*, 426 U.S. at 143-46. “Vested no later than the date each reservation was created, these Indian [reserved water] rights are superior in right to all subsequent appropriations under state law.” *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 574 (1983). Federal reserved rights, or “*Winters* rights,” are not lost for non-use under state-law concepts such as abandonment and forfeiture. *See, e.g.*, *Winters*, 207 U.S. at 577.

A fundamental purpose of most Indian reservations was to have Indians adopt a more agrarian lifestyle, thus one measure of *Winters* rights is the amount of water needed to irrigate the reservation’s “practicably irrigable acreage” (PIA). *Arizona v. California*, 373 U.S. at 600. Other cases recognize that Indian reservations may be set aside for additional purposes, and thus courts have recognized that an Indian tribe’s *Winters* rights generally include more than just PIA. *See, e.g.*, *United States v. Adair*, 723

F.2d 1394, 1408-10 (9th Cir. 1984) (recognizing *Winters* rights for hunting, fishing, and gathering purposes as well as for agricultural purposes); *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 35 P.3d 68, 79 (Ariz. 2001) (recognizing a “homeland purpose”).

Many reserved water rights claims, including tribal rights, have yet to be quantified. The most common method of quantification is by adjudication in court, often in a general stream adjudication. A general stream adjudication is a large, complex, and lengthy case (typically in state court) involving all water users in a particular river system, in which the court determines the existence and the elements (such as priority date, purpose, quantity, etc.) of existing rights to use water in that stream system. *See, e.g. New Mexico v. Trujillo*, 813 F.3d 1308, 1313 (10th Cir. 2016) (federal court general stream adjudication involving approximately 3,000 defendants); *see also In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 989 P.2d 739, 742 (Ariz. 1999) (“The purpose of a comprehensive general stream adjudication is to determine the nature, extent, and relative priority of the water rights of all who use the water of a river system and source.” (internal quotation marks omitted)). Although there are general stream adjudications ongoing across the western half of the United States, there is no such action pending in South Dakota.

Although the United States often asserts water rights claims on behalf of tribes, tribes may also bring their own suits to adjudicate water rights. *See* 28 U.S.C. § 1362 (granting district courts jurisdiction over civil actions brought by any Indian tribe

under federal law); *San Carlos Apache Tribe*, 463 U.S. at 559 (federal courts have jurisdiction to hear water rights suits brought by Indian tribes). Where settlements of Indian reserved water rights claims are reached, Congress typically enacts legislation to give effect to such settlements. *See, e.g.*, Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, tit. IV, 124 Stat. 3064, 3097-3122.

B. The Crow Creek Sioux Reservation and the Pick-Sloan Project

The Crow Creek Sioux Tribe is a federally recognized Indian tribe. Appx14. The Crow Creek Indian Reservation (“Reservation”) in central South Dakota was originally established in 1863, and the “Missouri River overlies the western boundary of the Reservation.” Appx14; *see also* Act of Mar. 2, 1889, ch. 405, § 6, 25 Stat. 888, 889-90 (delineating boundaries of the Reservation). Consistent with the *Winters* doctrine discussion above, the Tribe holds reserved water rights to accomplish the purposes of its Reservation with a priority date no later than the establishment of its Reservation. No general stream adjudication has been conducted for this stretch of the Missouri River or the watershed that includes the Reservation, however, and neither the United States nor the Tribe has ever brought suit to adjudicate the Tribe’s water rights.

In 1938, Congress initiated a comprehensive plan “for flood control and other purposes in the Missouri River Basin,” including irrigation and hydroelectric power. Act of June 28, 1938, ch. 795, 52 Stat. 1215, 1218. Six years later, Congress authorized additional comprehensive plans for the Missouri River Basin project, which

collectively became known as the Pick-Sloan Plan. Act of Dec. 22, 1944, ch. 665, 58 Stat. 887, 897-98. The Plan provided for multiple dams on the main stem of the Missouri River, including the Fort Randall Dam (erected between 1946 and 1952, operational in 1953) and the Big Bend Dam (erected between 1959 and 1963, operational in 1964). Appx16; Appx51, Appx83, Appx85. Construction of these dams flooded part of the Reservation. To compensate the Tribe, Congress enacted two statutes by which the United States acquired more than 15,000 acres of the Reservation and paid the Tribe and its members more than \$5 million “in settlement of all claims, rights, and demands of” the Tribe “arising out of” dam construction. Pub. L. No. 87-735, § 1(a)(2), 76 Stat. 704, 704 (1962) (Big Bend Dam); Pub. L. No. 85-916, § 1, 72 Stat. 1766, 1766 (1958) (Fort Randall Dam).

In 1996, Congress found that “the economy on the [Reservation] remains underdeveloped, in part as a consequence of the failure of the Federal Government to fulfill [its] obligations” under those two statutes. Pub. L. No. 104-223, § 2(a)(7), 110 Stat. 3026, 3027 (1996). Consequently, Congress established a new trust fund for the Tribe, to be funded with up to \$27.5 million in hydroelectric-power revenue from the Pick-Sloan Plan. *Id.* § 4, 110 Stat. at 3027-28. Interest from the trust fund is to be used for projects that benefit the Tribe, including “the construction, operation, and maintenance of a municipal, rural, and industrial water system for the [Reservation].” *Id.* § 5(b)(3), 110 Stat. at 3029.

C. Court of Federal Claims Proceedings

In 2016, the Tribe filed suit in the Court of Federal Claims seeking at least \$200 million in damages for the United States' alleged mismanagement of the Tribe's reserved water rights. The Tribe pleaded two claims "in the alternative" (Appx32): a Fifth Amendment takings claim and a breach-of-trust claim.² The takings claim is premised on the federal government's "diversion, sale, conversion, retention and storage control over ... the waters and natural flow of the Missouri River" in accordance with the Pick-Sloan Plan. Appx33. The breach-of-trust claim is founded upon 25 U.S.C. § 162a(d)(8), which provides that "the trust responsibilities of the United States" to Indian tribes include "[a]ppropriately managing the natural resources located within the boundaries of Indian reservations." The Tribe alleges that the United States violated this "money-mandating statute" through unspecified "transactions, acts, and omissions," including the operations associated with the Pick-Sloan Plan. Appx28-29; *see also* Appx18-19.

The Court of Federal Claims granted the United States' motion to dismiss the Tribe's claims under that court's Rule 12(b)(1) for lack of subject-matter jurisdiction. *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408 (2017), at Appx1-5. The United

² The Complaint includes a third "claim" that seeks different forms of relief but does not allege a distinct violation of law. Appx34-35. The Court of Federal Claims dismissed that claim, Appx5, and the Tribe has not argued for its reinstatement, so we do not address that issue further. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("[A]rguments not raised in the opening brief are waived.").

States offered several grounds for dismissal, but the court focused its analysis on “the threshold issue of standing or ripeness.” Appx3.

The court recognized, in light of the parties’ agreement for the purposes of the motion to dismiss, that the Tribe “is entitled to draw all the water it needs to supply the reservation … from the Missouri River,” that the Tribe’s standing turned on whether its Complaint contained well-pleaded facts showing that the Pick-Sloan Plan “resulted in [the Tribe’s] not having sufficient water for the reservation’s own purposes.” Appx3. The court rejected the Tribe’s view that any “taking or diverting waters from the Missouri River for whatever purpose” by the United States necessarily compromises the Tribe’s reserved water rights. Appx3-5. Instead, the court explained, the Tribe must “allege[] that such uses have reduced the amount of water available to the [Reservation]” to accomplish its purposes. Appx4. Yet the court could find nothing in the Complaint suggesting that the Tribe was “experienc[ing] a shortage of water” or that its current water supply from the Missouri River was “insufficient for its intended pursuits.” Appx4. Even after affording the Tribe “every latitude in its efforts to establish a cause of action,” Appx2, the court concluded that the suit must be dismissed because it could not “identify an injury to the Tribe that has yet occurred,” Appx5.

The court also addressed 25 U.S.C. § 162a(d)(8), the statute that the Tribe characterized as money-mandating. Although this provision is “concerned with the Government’s trust obligation to manage … trust assets,” the court explained, no

authority supported the Tribe's argument "that the statute defines specific obligations regarding a tribe's natural resources." Appx4. The court observed that it could not hear a breach-of-trust claim that was premised on "only general obligations" imposed by the "trust relationship between the United States and Indian tribes." Appx5.

SUMMARY OF ARGUMENT

The Tribe's takings and breach of fiduciary duty claims were properly dismissed because they lack an essential element to support jurisdiction—a genuine case or controversy. The Tribe fails to allege that it lacks sufficient water or that the government's actions have prevented it from using its water rights, and thus it fails to make any showing of concrete injury. Further, any claimed injury could not be redressed: the Tribe seeks an order requiring the United States to assert and quantify Tribal water rights, but that relief exceeds the authority of the Court of Federal Claims. Applying either a standing or a ripeness analysis, the Tribe's allegations fail to allege a justiciable dispute.

The Court of Federal Claims lacked jurisdiction for an additional reason not reached by the court below: the Tribe's claims are barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2501. The claims stem from the construction and operation of the Fort Randall and Big Bend dams, which were completed by 1964. And the Complaint identifies no recent specific action by the United States that falls within the six-year limit.

Finally, the Tribe's breach-of-trust claim fails for want of a specific money-mandating provision. The general instruction in 25 U.S.C. § 162a(d)(8) that the United States "appropriately manag[e] ... natural resources" is not the sort of "specific" duty that a court may enforce in a breach-of-trust action brought by an Indian tribe against the United States. Congress did not define "natural resources" or provide even rudimentary guidance as to what would be "appropriate" management of any such resource, much less how to manage a "right" to a particular resource. Those courts that have suggested that other provisions of Section 162a (in combination with other statutory mandates) establish a specific fiduciary duty have done so only in the context of trust funds, not management of water rights or natural resources themselves. For this independent reason, the Court of Federal Claims lacked subject-matter jurisdiction over the Tribe's claims.

The judgment of dismissal should be affirmed.

STANDARD OF REVIEW

Subject-matter jurisdiction is a question of law that this Court reviews de novo. *Hopi Tribe v. United States*, 782 F.3d 662, 666 (Fed. Cir. 2015). The Tribe bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Id.* At the pleading stage, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

ARGUMENT

A “federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007). This brief presents three threshold grounds supporting dismissal of the Tribe’s claims: (1) Article III standing or ripeness; (2) the statute of limitations; and (3) for the breach-of-trust claim, the absence of a money-mandating statute. This Court may affirm the decision of the Court of Federal Claims on any or all of these grounds. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1368 (Fed. Cir. 2005)

I. The Tribe Does Not Present an Article III Case or Controversy.

The Constitution limits judicial authority to the resolution of actual “cases” or “controversies.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The doctrines of standing and ripeness “originate” from that limitation and help to ensure that federal courts hear only those disputes appropriately resolved through the judicial process. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Although the constitutional standing requirements are derived from Article III of the United States Constitution, those same requirements apply to actions in the Court of Federal Claims. *See Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

To establish constitutional standing, the “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547. The plaintiff bears the burden of establishing standing for each of its claims

and for each form of relief that is sought. *Davis v. FEC*, 554 U.S. 724, 734 (2008). To survive a motion to dismiss for lack of standing, the plaintiff must “clearly ... allege facts demonstrating’ each element” of standing. *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Ripeness is a constitutional doctrine that ensures the existence of a justiciable case or controversy by avoiding premature adjudication. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The ripeness inquiry considers the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *National Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08 (2003); *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1348 (Fed. Cir. 2015).

“The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing’s injury in fact prong.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (en banc); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 n.6 (Fed. Cir. 2008) (noting that injury-in-fact inquiry can also be viewed through ripeness doctrine). Where, as here, standing and ripeness issues “boil down to the same question,” the Supreme Court typically applies a standing analysis. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014) (citations omitted). This brief adopts that approach.

A. The Tribe Has Not Alleged Any Actual or Imminent Injury to Its Right to Use Missouri River Water to Accomplish the Purpose of Its Reservation.

To establish injury in fact, the Tribe must show that it suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Spokeo*, 136 S. Ct. at 1547-48 (internal citations and quotations omitted); *see also Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) (injury in fact is “a hard floor of Article III jurisdiction”). The United States assumes for the purposes of its standing argument that the Tribe possesses a federal reserved water right to Missouri River water that (if taken) could form the basis of a Fifth Amendment claim and that (if mismanaged) could form the basis of a breach-of-trust claim. *See Appx14, Appx18.* Interference with a legally protected reserved water right is a concrete and particularized injury. But, as the Court of Federal Claims correctly held, the Tribe has failed to identify any concrete interference with the Tribe’s water right that has yet occurred. Appx5. Put differently, the Tribe has not alleged any “actual or imminent” injury to its cognizable interest that could confer federal jurisdiction over its claims. *Spokeo*, 136 S. Ct. at 1548.

The Complaint is devoid of any allegations that the Tribe’s right or ability to use the water in or around the Missouri River has been injured, damaged, or impaired in any way. For example, the Tribe has not alleged that it has tried to use water from the Missouri River for the purposes of the Reservation. Nor has the Tribe alleged that it even has the ability to use such water, but was unable to do so because of the

actions of the United States. *Cf. Washoe County v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (finding no taking where government “neither physically appropriated nor denied meaningful access to Appellant’s water rights”). Nor has the Tribe alleged that it is entitled to use a particular amount of water to meet the purposes of the Reservation, but that such amount is not available to it because of government action. The Court of Federal Claims correctly focused on this utter lack of alleged injury, noting at oral argument that the Tribe had not argued “that you don’t have sufficient water.” Appx297. Counsel for the Tribe did not disagree, conceding that “[t]here isn’t any [Missouri River] water being used on the reservation at this time.” Appx298.

At most, the Tribe has suggested that the Pick-Sloan dams generally affect water flows and water management on the Missouri River, to which the Tribe has water rights. Appx33. But the Tribe does not (and could not) contend that it has a right to *all* water from the river. The Tribe has reserved water rights only “to the extent needed to accomplish the purpose of the reservation.” *Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559, 561 (Fed. Cir. 1982); *accord* Brief for Plaintiff-Appellant (“Br.”) at 3. And because the Tribe’s water right is usufructuary, an upstream diversion does not infringe on that right unless the diversion actually prevents the Tribe from using the water to which it is entitled. *See supra* p. 3; *Casitas II*, 708 F.3d at 1352-53. The Complaint alleges no facts showing that water management by the Pick-Sloan dams prevents or limits the Tribe from accessing sufficient water to achieve the purposes of the Reservation. Without some allegation of actual

infringement of the Tribe’s right to use water, any injury to that right is “conjectural or hypothetical.” *Spokeo*, 136 S. Ct. at 1548.

The Tribe suggests (Br. 28, 31) that its injury is “actual” because its reserved water rights are not inchoate but rather “present perfected rights.”³ *See also* Appx3 (reciting this argument). Assuming arguendo that the Tribe’s characterization of its rights is correct, the mere existence of a right does not show that it has been infringed. The question for purposes of standing is whether the Tribe’s (actual) water right has actually been—or imminently will be—injured by actions of the United States. The allegation of actual or imminent harm is simply missing from the Complaint.

The Tribe argues (Br. 30) that it “alleged factual harm” in unspecified portions of five pages of its Complaint (Appx17-19, Appx21, and Appx33). But these pages contain only conclusory allegations of injury due to unspecified actions of the federal government. *E.g.*, Appx19 (“Defendant’s zeal to develop non-Indian water interests unfortunately left Tribal rights and needs to languish.”). Such “threadbare recitals” of injury-in-fact, “supported by mere conclusory statements, do not suffice” to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“[E]ach element [of Article III standing] must be supported in the

³ The term “present perfected rights” as used in *Arizona v. California* originates in the Colorado River Compact. It is a term that the Supreme Court defined for purposes of its decree relating to that river system, not as a term of generally applicability. *See* 376 U.S. 340, 341 (1964) (decree); 373 U.S. 546 (1963) (opinion).

same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of the litigation.”). Nor can the Tribe rest on “legal conclusion[s] couched as … factual allegation[s].” *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see, e.g.*, Appx21 (“Defendant is liable for the following breaches, acts and omissions, *inter alia*, in violation of substantive law . . .”); Appx33 (“Defendant’s actions . . . amount to a Fifth Amendment taking of Plaintiff’s water and water rights.”).

Many of the Tribe’s alleged harms are also based on the faulty premise that it possesses “water” instead of a “water right.” *Compare* Appx17 (“*Winters* reserved water rights”), Appx33 (“water rights) with Appx21 (“Plaintiff’s water and *Winters* reserved water rights”); Appx33 (“Plaintiff’s water”). As a matter of law, the Tribe has no compensable property interest in particular molecules of “water.” *See, e.g., Casitas II*, 708 F.3d at 1354 (water rights holder “does not have a possessory property interest in the corpus or molecules of the water itself” under California law); *supra* p. 3 (interest in water is usufructuary). Standing may not be based on a purported injury to an interest that does not exist as a legal matter. *See Spokeo*, 136 S. Ct. at 1548 (standing must be based on a “legally protected interest”); *see also Warth v. Seldin*, 422 U.S. at 500 (standing “often turns on the nature and source of the claim asserted”).

The Tribe suggests that the Court of Federal Claims’ decision was based primarily on a concern about calculating damages. Br. 7-8, 10, 26-27. But the court’s primary concern was not that the Tribe was unable to prove the *amount* of damages at

this stage of the case, but rather that it was unable to show that it had been damaged *at all*. See Appx1 (“Plaintiff’s pleadings do not show how damages from an alleged taking could have accrued currently.”); Appx4 (“Plaintiff has not suggested what damages the Tribe might have incurred from the Government’s diversion of water from the Missouri River or how the court could determine the amount of such damages.”).

The Tribe relies (Br. 32-33) on *Casitas Municipal Water District v. United States (Casitas I)*, 543 F.3d 1276 (Fed. Cir. 2008), to suggest that it need only plead that “the government’s policy reduced the amount of available water for plaintiff’s use” because “the water, and Casitas’ right to use that water, is forever gone.” This Court later clarified, however, that mere diversion of water does not establish an injury to a downstream water rights holder. *Casitas II*, 708 F.3d at 1352-53. *Casitas I*, cited by the Tribe, did not “substantively consider[] the scope of [the plaintiff’s] rights in the diverted water nor address[] whether a taking actually occurred.” *Id.* at 1353.

Casitas II, which was decided on ripeness grounds, set forth a more stringent test for subject-matter jurisdiction over claims for the taking of water rights. The plaintiff must demonstrate that government action has injured its specific, legally protected water-use right. *Id.* at 1359. Thus, even though the plaintiff there possessed a contractual right to use up to a specified quantity of water, its legally protected water right was limited by state law. The court thus lacked jurisdiction unless and until the plaintiff could show that actions of the United States “caused [the plaintiff] to deliver

to its customers less water than it would otherwise have delivered.” *Id.* at 1358.

Similarly, the Tribe has not alleged that its legally protected water right—the right to use sufficient water to fulfill the purposes of the Reservation—has been impaired.

The Tribe also relies (Br. 32) on *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001). But the plaintiffs in *Tulare Lake* made allegations of injury that are lacking here—namely, that they were water users with permitted rights to use specific quantities of water and that government water-use restrictions deprived them of the right to use this quantity of water—and the United States did not contest standing in that case. *Id.* at 315-17. The same is true for *Dugan v. Rank*, 372 U.S. 609, 613-14, 616 (1963) (Br. 32-33), in which there was no dispute among the parties as well as a previous court finding that Bureau of Reclamation project actually interfered with plaintiffs’ water rights. The Tribe’s claims here, in contrast, are devoid of the required showing of concrete harm to its water-use right.

B. The Tribe’s Requested Relief Cannot Redress Any Alleged Injury.

To satisfy the third prong of the standing analysis, there must be “a likelihood that the requested relief will redress the alleged injury.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). The Tribe requests monetary damages for “the value of trust assets and natural resources lost through Defendant’s actions and omissions” (Appx28), damages for the alleged taking (Appx34), and a judgment requiring the United States to establish, measure, quantify, and assert the Tribe’s water rights (Appx34).

As discussed above, the Tribe has not identified any particular diversion or deficiency of the Tribe’s water supply that has caused it injury, and the Tribe has not alleged the capacity to use water that it has been denied. Instead, the Tribe makes vague, broad claims regarding speculative losses to its “water” or its water rights. Because of how the Tribe has framed its purported injury, such injury could be redressed only by a quantification of the Tribe’s water rights, which would permit damages to be calculated based on the scope of those rights and any loss of use created by the federal government’s actions. Indeed, the Tribe expressly seeks declaratory and injunctive relief requiring the United States to “establish and measure,” “quantify,” and “assert” water rights on the Tribe’s behalf, as well as to “record legal title to water held in trust” for the Tribe. Appx34; *see also* Appx31 (claiming breach of trust stems from failure to “protect, quantify, assert, or record Plaintiff’s water rights”).

But quantifying the Tribe’s water rights can be conclusively accomplished only through the filing of an action either in state court or in federal *district* court (or via a legislative settlement resolving claims asserted in such litigation). *See supra* p. 5. The Court of Federal Claims simply lacks authority to conduct that adjudication itself, for it “has no general power to provide equitable relief against the Government or its officers.” *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 313 (2011). Nor does the Court of Federal Claims have any power to order the United States to institute litigation elsewhere on behalf of the Tribe. To the contrary, the decision to file a claim

in court, including a water rights claim on behalf of an Indian tribe, is squarely within the discretion of the Department of Justice, 28 U.S.C. §§ 516, 519, and is “presumptively immune from judicial review.” *See Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480-81 (D.C. Cir. 1995); *accord, e.g., Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972). Requested relief that exceeds the court’s authority cannot support standing. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (court must evaluate whether requested injunctive relief is within court’s authority, and if not, whether plaintiffs’ injuries were nonetheless redressable). Because the Court of Federal Claims lacks authority to quantify the Tribe’s water rights or to order the United States to file suit to quantify the Tribe’s water rights, the Tribe’s requested relief cannot redress any purported injury.

For this reason, and because the Tribe has not alleged any actual or imminent injury, the Tribe lacks standing to press its claims.

II. The Tribe’s Claims Are Barred by the Statute of Limitations.

The Tribe’s takings and breach-of-trust claims should be dismissed for an additional, alternative reason: they are barred by the statute of limitations. Congress has barred “[e]very claim of which the United States Court of Federal Claims has jurisdiction unless … filed within six years after such claim first accrues.” 28 U.S.C. § 2501. This limitations period is jurisdictional and not subject to equitable tolling. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1349 (Fed. Cir. 2011).

A. The Tribe's Breach-of-Trust Claim Accrued No Later than 1964.

The Tribe's claim accrued "when all the events which fix the government's alleged liability have occurred and [the Tribe] was or should have been aware of their existence." *San Carlos Apache Tribe*, 639 F.3d at 1350. This is an objective standard; the Tribe "does not have to possess actual knowledge of all of the relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). A breach of trust claim accrues when "the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). "The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as trustee or by express words." *Id.*

According to the Complaint, the United States' purported breach of trust stems from the construction of the Fort Randall Dam in 1946 and the Big Bend Dam in 1960. Appx16.⁴ The Tribe alleges that "[a]ll this time"—i.e., in the 1940s, 1950s and 1960s—Plaintiff's *Winters* reserved rights were simply ignored" and that Plaintiff failed to receive economic benefits from Pick-Sloan "despite the fact that said benefits were derived from Plaintiff's (and other Missouri River Tribes') *Winters* reserved water rights." Appx16; *see also* Appx28. The Tribe concedes that the Bureau of Indian Affairs "fully informed Plaintiff of the damage it would eventually suffer to Tribal

⁴ Construction of the Big Bend Dam actually commenced in 1959. *See* Appx83.

lands” in 1949. Appx16. Construction of the two dams spanned seventeen years, from 1946 to 1963. Appx83-85. It is clear, therefore, that the Tribe was aware of all of the facts that it asserts constitute a breach of trust no later than 1964, when the Big Bend Dam became operational. *See, e.g., San Carlos Apache Tribe*, 639 F.3d at 1350 (Tribe’s breach of trust claim accrued at the time of the government’s action, not when the full extent of damages are known); *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (same).

This is confirmed by the Tribe’s participation in 1975 in a Senate Hearing, at which the Tribe’s representative made a claim that is nearly identical to the one pressed in this lawsuit. *See Appx113* (reproducing *Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy: Hearings before the S. Subcomm. on Energy Research and Water Resources, Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 386-90 (1975)). At that hearing, Tribal councilman Ray Leanna stated that “in the opinion of the Crow Creek Sioux Tribe, … the Secretary of the Army and Secretary of the Interior have acted beyond their scope of authority, not in the best interest of the Indian tribes on the Missouri River Basin”; and that “[f]urther, that the Interior Department has willfully neglected its trust responsibility to protect Indian water rights.” Appx113. The Tribe’s chairman also participated in a 2007 Senate Hearing during which the Chairman of the Lower Brule Tribe explicitly articulated harms identical to those alleged here. *See Impact of the Flood Control Act of 1944 on Indian Tribes Along the Missouri River: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong.,

1st Sess. 59 (2007) (statement of Michael B. Jandreau that the “United States took our best land and our water (under the *Winters* doctrine) to produce electricity”); *see also Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984) (treating tribal participation in congressional proceedings as demonstrating awareness of purported injuries).

The Tribe alleges that it “was denied essential information necessary to be aware of the wrongs committed by Defendant,” but the only support for this assertion is that “[t]o this day, Plaintiff’s *Winters* doctrine rights have never been fixed, quantified, or resolved.” Appx29. But the accrual date of a cause of action will be suspended in only two circumstances which are “strictly and narrowly applied”: the plaintiff “must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was ‘inherently unknowable’” at the time the cause of action accrued. *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc) (*quoting Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985)); *Menominee Tribe of Indians*, 726 F.2d at 721 (facts of alleged forest mismanagement not inherently unknowable where facts were available if Tribe launched an inquiry through its agents). As discussed above, the first exception does not apply because the Tribe has been aware of the operation of the dams since at least 1964, and because the Tribe articulated its allegations of harm from the dams no later than 1975. Injury to water rights is not “inherently unknowable” simply because the water right is not quantified; the Tribe would certainly be aware if it were

prevented from using the water it needed. Further, if (as the Tribe suggests) its federal reserved water right must be quantified in order for its breach-of-trust claim to accrue, then that claim has *not yet accrued* and thus is not ripe.

Nor does the continuing-claim doctrine save the Tribe's breach-of-trust claim. That doctrine only applies when "the plaintiff's claim [is] inherently susceptible to being broken down into a series of independent or distinct events or wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). The alleged breach of trust here stems from a discrete event—the United States' construction and operation of two dams on the Missouri River, both of which were operational by 1964. "[T]he continuing claims doctrine does not apply to a claim based on a single distinct event which has ill effects that continue to accumulate over time." *Ariadne Financial Services Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998); *see also Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). The Tribe's Complaint has pointed to no sufficiently "independent and distinct events" that incurred identifiable damages occurring in the six years prior to the filing of its Complaint.

B. The Tribe's Takings Claim Accrued No Later Than 1964.

The Tribe's Complaint identifies no specific government action that could have affected or "taken" its water right after 1964, when the Big Bend Dam became operational. Thus, if the Tribe's water use right has been "taken" at all, this taking occurred no later than that date, and it is far outside the statute of limitations. Cf.

Estate of Hage v. United States, 687 F.3d 1281, 1289 (Fed. Cir. 2012) (finding water rights takings claim barred by statute of limitations where fences around springs and streams were constructed more than six years before complaint); *see also Boling*, 220 F.3d at 1373-74 (continuing claims doctrine does not apply to takings claim where single government action resulted in ongoing damage to property).

Dismissal of the Tribe's claims should be affirmed for the additional reason that they accrued more than six years ago and are barred by the statute of limitations.

III. The Tribe Has Not Identified a Money-Mandating Statute That Could Support Jurisdiction Over Its Breach-of-Trust Claim.

The Court of Federal Claims correctly concluded that it lacked jurisdiction over the Tribe's breach-of-trust claim for an additional reason: the Tribe failed to identify any statute that creates a duty, enforceable in a suit for money damages, to affirmatively manage the Tribe's water rights or natural resources. Appx5.

A. Jurisdictional Requirements for a Breach-of-Trust Claim.

The Tucker Act, 28 U.S.C. § 1491(a)(1), grants the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States. . ." The Indian Tucker Act, "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting

25 U.S.C. § 1505). However, “[n]either the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g. statutes or contracts).” *United States v. Navajo Nation (Navajo II)*, 556 U.S. 287, 290 (2009); *accord Hopi Tribe*, 782 F.3d at 666. That other statute or source of law must establish a specific right enforceable against the federal government by a claim for money damages. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 217 (1983); *Navajo II*, 556 U.S. at 290.

Accordingly, a tribal plaintiff must clear “two hurdles” to satisfy the jurisdictional requirements of the Indian Tucker Act. *Navajo II*, 556 U.S. at 290 (citing *United States v. Navajo Nation (Navajo I)*, 537 U.S. 488, 506 (2003)). First, the plaintiff “must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.” *Navajo I*, 537 U.S. at 506; *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (“The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.”). At this stage, “a statute or regulation that recites a general trust relationship between the United States and Indian people is not enough to establish any particular trust duty.” *Hopi Tribe*, 782 F.3d at 667 (citing *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542-44 (1980)). Instead, the reviewing court’s analysis “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.” *Navajo I*, 537 U.S. at 507. “When the

Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Jicarilla Apache*, 564 U.S. at 177; *accord Navajo II*, 556 U.S. at 301-02.

If the plaintiff passes the first hurdle, it must then show that the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties" imposed by the governing law. *Id.* At the second stage, principles of trust law might be relevant "in drawing the inference that Congress intended damages to remedy a breach.'" *Navajo II*, 556 U.S. at 291 (citing *White Mountain Apache Tribe*, 537 U.S. at 477).

The Tribe's claim cannot clear either hurdle. First, the general instruction in 25 U.S.C. § 162a(d)(8) to "appropriately manag[e] ... natural resources" does not establish any "specific" duty regarding tribal water rights. *See Navajo I*, 537 U.S. at 506. Second, even if this provision did contain a fiduciary duty to manage water rights, it does not mandate monetary compensation.

B. Section 162a(d)(8) Does Not Establish a Specific Fiduciary Duty Regarding the Management of Water or Water Rights.

1. Section 162a(d)(8) Lacks the Specific Rights-Creating or Duty-Imposing Terms to Support Indian Tucker Act Jurisdiction.

Section 162a of Title 25 provides authorities and instructions to the Secretary of the Interior regarding the management of Indian *money* held by the United States,

not the management of natural resources. The section is titled “Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required.” It is entirely concerned with matters such as the deposit of trust funds into banks (subsection (a)) and the investment of tribal funds into particular investment vehicles and public debt obligations (subsections (b) and (c)). Subsection (d) lists eight items as included within “the Secretary’s proper discharge of the trust responsibilities of the United States,” seven of which plainly concern the management of money. *Id.* The eighth item is “appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.” 25 U.S.C. § 162a(d)(8). The Tribe bases its breach of trust claim on this final provision.

But these fifteen words are not the sort of “specific rights-creating or duty-imposing statutory or regulatory prescriptions” that the Supreme Court requires to support Indian Tucker Act jurisdiction. *Navajo I*, 537 U.S. at 507 (Indian Mineral Leasing Act does not give Secretary sufficient managerial control or other specific responsibilities to support Indian Tucker Act jurisdiction). Section 162a lacks any specific guidance to the Secretary: it does not define “natural resources,” and it does not mention water or water rights. Indeed, it is not clear that a water right—a usufructuary right, rather than a tangible resource—should be considered a “natural resource” or that a water right is properly considered to be “located within the boundaries of [the Tribe’s] reservation or trust lands.”

This statute authorizes no role for the Secretary with regard to water projects or water rights. *Cf. Hopi Tribe*, 782 F.3d at 669 (affirming dismissal for lack of jurisdiction where neither the statute nor the executive order “refers to drinking water on the reservation, much less instructs the United States to manage drinking water quality”). The statute does not define “appropriate management” of natural resources. Nor does it provide any guidance, standards, or specific obligations to direct the Secretary of the Interior in administering this supposed fiduciary responsibility.⁵

The Supreme Court has held that statutes granting the Secretary of the Interior a far greater role in managing a specific, identified trust asset nonetheless fail to establish a specific fiduciary duty. For example, in *Navajo I*, the Court found that the Indian Mineral Leasing Act of 1938 (IMLA) did not assign specific fiduciary duties to the Secretary of the Interior in connection with the Secretary’s approval of coal lease amendments. 537 U.S. at 507. This was true even though the IMLA assigned an

⁵ The Tribe suggests that “no greater specificity” than the language in Section 162a(d)(8) is required. Br. 14. But the majority of the cases cited by the Tribe predate *Mitchell II*, *Navajo*, and *White Mountain Apache* and thus do not reflect the Supreme Court’s direction as to fiduciary duty claims. See *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980). And *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 737 (2011), the sole recent case cited, concerned claims for mismanagement of trust funds and a finding that a network of statutes “vest the United States with management control over the trust funds, discretion with respect to their investment, and detailed responsibilities to account to the tribal beneficiaries.” *Id.* at 732-32. That case is not relevant here, where water rights (not trust funds) are at issue, and there is no statute or regulation vesting the Secretary with any duties or control over tribal water rights, much less the type of detailed responsibilities in *Jicarilla*.

approval role for the Secretary and authorized him to promulgate regulations on the subject. *Id.* But the Court concluded that this was not sufficient, because “the IMLA and its regulations do not give the Federal Government full responsibility to manage Indian resources … for the benefit of the Indians,” nor do they “assign to the Secretary managerial control over coal leasing.” *Id.*; *cf. Mitchell II*, 463 U.S. at 221-22 (finding specific fiduciary duty where a network of statutes and regulations imposed specific management duties on the Secretary, and provided detailed standards to guide the Secretary’s actions). The paltry instruction to the Secretary in Section 162a(d)(8) falls far short of the standard set by *Navajo I*.

The Tribe argues that the “plain language” of the provision imposes an enforceable trust duty (Br. 16), but this ignores the quartet of Supreme Court opinions that must guide the jurisdictional inquiry.⁶ As the D.C. Circuit explained after reviewing and synthesizing this law, “[a] statute’s invocation of trust terminology is not itself dispositive, since the statute may create either a judicially enforceable trust as in *White Mountain* or a “bare trust,” not judicially enforceable, as in *Mitchell IEl Paso Natural Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014); *see also Jicarilla Apache Nation*, 564 U.S. at 174 (“Congress may style its relations with the Indians a ‘trust’ without assuming all the fiduciary duties of a private trustee”); *Hopi Tribe*, 782

⁶ The Tribe also suggests that the “Indian canons of construction” help their cause here (Br. 17), but the Supreme Court has never suggested that these canons play a role in the Indian Tucker Act inquiry.

F.3d at 669 (language indicating that land would be held “in trust” “does not establish any particular fiduciary duty to manage water resources on the land”).⁷

The better reading of Section 162a is that it addresses the management of trust funds, not water rights. Its provisions, its title, and the entirety of the subchapter in which Section 162a is found concern the management of Indian money held by the United States. The Tribe argues that “a section title cannot substitute for the operative text of the statute.” Br. 17 (citing *Pennsylvania Dep’t of Corrections v. Yesky*, 524 U.S. 206, 212 (1998)). But the section title provides insight regarding whether paragraph (d)(8) clearly assigns specific, enforceable fiduciary duties as to tribal water rights, or natural resources more generally. *See Mitchell I*, 445 U.S. at 542 (considering provision in the context of the statute as a whole); *see also Pennsylvania Dep’t of Corrections*, 524 U.S. at 212 (A statute’s title can help with interpretation by “shed[ing] light on some ambiguous word or phrase.”). Here, it strains credulity that Congress would have imposed a specific fiduciary obligation to manage a critical and expansive subject such

⁷ The Government’s brief in *United States v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), is not inconsistent with its position here. *See Br. 15* (citing Brief for the Petitioners, No. 99-1871, 2000 WL 1706727 (Nov. 9, 2000)). This pre-*Navajo* case concerned the applicability of a Freedom of Information Act exemption to documents passing between Indian tribes and the Department of the Interior regarding water rights proceedings. The Government’s brief cited Section 162a(d)(8) along with other statutes and cases as further support for a general trust relationship relating to tribes’ natural resources and the need for the Department to be able to consult with tribes confidentially. The brief did not state or suggest that Section 162a(d)(8) created a specific and enforceable fiduciary duty to manage water rights.

as Indian water rights or other undefined “natural resources” by burying it in just a few words in a statute regarding the management of trust funds.

The legislative history confirms this view. *See Mitchell I*, 445 U.S. at 543 (considering legislative history). Section 162a(d) was added to the statute by the Indian Trust Fund Management Reform Act, a stated purpose of which was “to bring about better accountability and management of Indian trust funds by the Department of the Interior and to provide an opportunity for Indian tribes to directly manage their trust funds.” H.R. Rep. No. 103-778, at 8 (1994). The statute “sets out the Secretary of the Interior’s responsibilities to American Indian trust fund account holders,” provides the Secretary with authority to settle claims on individual accounts for uncredited interest, requires the Secretary to assist tribes in implementing trust fund investment plans, and establishes a Special Trustee for American Indian trust funds to plan and oversee management reforms. *Id.* at 8-9. The House committee report contains no indication that Congress intended to impose any specific responsibilities on the Secretary regarding the management of water rights or natural resources more generally; indeed, it does not even contain the word “water.”⁸

⁸ That Congress was only contemplating trust *funds* in Section 162a(d)(8) is also supported by the original draft of that provision, which specified that it was directed at funds derived from tribal natural resources: “The Congress recognizes that the trust responsibility of the United States extends to tribal and individual Indian owners of natural resources located within the boundaries of Indian reservations and trust lands. This includes the fiduciary responsibility to manage funds held in trust by the United States for Indian tribes and individual Indians derived from actions including, but not

Cont.

Nor can the Tribe rely on common-law principles (Br. 18) until it identifies a statute that establishes a specific fiduciary duty; common-law trust principles cannot create such a duty in the first instance. *See Navajo II*, 556 U.S. at 302 (where “the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, … common-law trust principles” do not matter); *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 757 (2016) (“any specific obligations the Government may have under [the general trust] relationship are ‘governed by statute rather than the common law’” (quoting *Jicarilla Apache*, 564 U.S. at 165)). The Tribe has not cleared that threshold.

The Tribe cites *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972), in support of its theory that “the Government has a common law fiduciary duty to assert its authority to the fullest extent possible.” Br. 19. But that Administrative Procedure Act case, which pre-dates all of the Supreme Court case law addressing the Indian Tucker Act, held only that the Secretary could not issue a regulation that directly interfered with the Tribe’s water right. The remaining cases cited by the Tribe (Br. 19) address tribal fisheries or fishing rights, and do not bear at all on the question whether the United States has an enforceable duty to manage Indian water rights.

limited to, the use and sale of leased lands, judgments, mineral leases, oil and gas leases, timber permits and sales, and water resources.” H.R. 1846, 103d Cong., 1st Sess. (1993).

Moreover, the Tribe presents no reason to treat the management of water rights differently from the management of any other asserted “natural resource.” Under the Tribe’s reasoning, these fifteen words in the statute impose a specific duty on the Secretary to manage all “natural resources” within reservation boundaries, across the nation—even though the statute does not define “natural resources” or provide a single direction or guidepost for the Secretary as to how to fulfill this immense task, much less any specific authorities by which to carry it out. Congress cannot reasonably be thought to have imposed this massive responsibility on the Secretary without more specific direction or authority.

2. No Court Has Held that Section 162a(d)(8) Creates a Specific Fiduciary Duty as to Water Rights or Any Other Natural Resource.

The Tribe asserts that “[c]ourts have expressly found 25 U.S.C. 162a to be money-mandating.” Br. 12-13. But the cases cited by the Tribe do not suggest, much less “expressly find,” that Section 162a(d)(8) creates a specific or money-mandating duty to manage tribal water rights or natural resources. In *Mitchell II*, the Supreme Court mentioned Section 162a only twice; in both instances, the Court simply described Section 162a as addressing the management of Indian funds. See 463 U.S. at 211 (describing Section 162a as a “statute[] governing Indian funds and government fees”); *id.* at 222 n.24 (describing Section 162a as giving the Secretary the authority to invest tribal and individual Indian funds held in trust under certain conditions).

Nothing in *Mitchell II* suggests that Section 162a, standing alone, creates an

enforceable fiduciary duty. *See id.* at 230 (Powell, J., dissenting) (“The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy.”).

The Tribe also cites three other cases, none of which aid the Tribe’s argument. Br at 13. *Evans v. United States*, 107 Fed. Cl. 442 (2012), cited *Mitchell II* for the proposition that Section 162a is money-mandating, but then found that plaintiff had not alleged any violation of the provision. *Id.* at 457. *Evans*’s discussion of Section 162a is thus dicta. *Jicarilla Apache Nation* involved “the United States’ accounting, management, and investment of Jicarilla’s trust funds from 1972 to 1992,” 100 Fed. Cl. at 731, not tribal water rights or natural resources. And in *Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 26 (2010), the court described 25 U.S.C. §§ 161a, 161b, 162a, and other sources of law as an “applicable legal requirement” for the management of royalties from the Osage mineral estate, but made no findings regarding whether section 162a met the *Mitchell II* test. Lastly, the Tribe also cites (Br. 14) *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 33 (D.D.C. 1998), but that APA case concerned the management of individual Indian money accounts, not natural resources; it did not address whether, much less conclude that, Section 162a creates an enforceable fiduciary duty under the Indian Tucker Act.

At most, these cases acknowledge that some portions of Section 162a, combined with other statutes, may support a specific fiduciary duty as to *funds* that are held by the United States and are managed pursuant to a robust statutory and

regulatory scheme. But a statute that creates an enforceable fiduciary duty as to the management of one asset (e.g., money) does not establish a similar duty as to management of other assets. *Cf. Shoshone Indian Tribe of Wind River Reservation*, 364 F.3d at 1350 (finding Court of Federal Claims erred when it equated the mismanagement of trust assets with losses to trust funds for purposes of statute deferring accrual of breach-of-trust cause of action). These cases do not establish that Section 162a(d)(8) creates a specific fiduciary duty to manage tribal water rights.

Relying on *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005), the Tribe suggests that these cases permit the Court to shortcut the *Navajo II* analysis of Indian Tucker Act jurisdiction. Br. 13. But *Fisher* did not alter the Indian Tucker Act analysis; to the contrary, it confirmed that the trial court must first determine “whether the Constitutional provision, statute, or regulation is one that is money-mandating,” and if it is not, it “shall dismiss the cause for lack of jurisdiction.” *Id.* at 1173. The *Fisher* court pointed to *Mitchell II* and its progeny as governing the money-mandating inquiry. *Id.* at 1174.⁹ If the court finds that a particular statute meets this standard, “the court shall declare that it has jurisdiction over the cause,” and the court does not need to reevaluate at the merits stage whether the “plaintiff has a money-mandating source on

⁹ The *Fisher* court noted that there was some question as to whether *White Mountain Apache* altered the *Mitchell II* test. *Id.* Since *Fisher*, the Supreme Court has decided *Navajo II* and *Jicarilla Apache*, which clarify that the test outlined in *Mitchell II* and *Navajo I* has not been relaxed in any way. *Navajo II*, 556 U.S. at 296-301.

which to base his cause of action.” *Id.* at 1173.¹⁰ But if it does not meet the standard, “the absence of a money-mandating source [is] fatal to the court’s jurisdiction under the Tucker Act.” *Id.* That is the case here: Section 162a(d)(8) does not establish a specific fiduciary duty, and Court of Federal Claims correctly determined that it lacked jurisdiction over the breach of trust claim.

C. Even If Section 162a(d)(8) Creates a Specific Fiduciary Duty, It Does Not Mandate Compensation for Breach of Those Duties.

Even if Section 162a(d)(8) could clear the first hurdle for Indian Tucker Act jurisdiction, it fails at the second hurdle because it cannot “fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties” imposed by the governing law. *Navajo II*, 556 U.S. at 301-02. Section 162a contains no express provision for monetary relief. More significantly, paragraph (d)(8) lacks the hallmarks of a statutory provision that contemplates monetary relief, such as a measure of damages.

Mitchell II is illustrative. In that case, the Court recognized that the statutes and regulations at issue required the Secretary to manage the tribal timber resources “so as to generate proceeds for the Indians.” 463 U.S. at 227. The Court concluded that it

¹⁰ According to *Fisher*, whether a statute supports Indian Tucker Act jurisdiction is a question of law. *See* 402 F.3d at 1173. As such, the question of the court’s subject matter jurisdiction cannot be “inextricably intertwined with the merits of the Tribe’s claim.” Br. 23. None of the “legion of exemplar cases” cited by the Tribe (Br. 25) deferred ruling on the jurisdictional questions of whether a statute supports Tucker Act or Indian Tucker Act jurisdiction, standing, or ripeness, and the Tribe has not made a showing that a deferral is appropriate here.

“would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary’s duties were not performed.” *Id.* Thus, in the case of the Indian timber statutes, the Court found a statutory direction for the Secretary to follow—to manage the asset to generate proceeds for the tribe—and therefore a measure of damages if that direction were not fulfilled.

In contrast, Section 162a(d)(8) indicates that trust duties include “appropriately managing” natural resources, but it does not provide any guidance as to what this means for water or any other natural resource, much less what it could mean for managing more abstract rights to such resources. This language could conceivably require the Secretary to “generate proceeds” like the timber statutes in *Mitchell II*, but it could instead mean to manage a resource in a way that conserves it for the future or to manage in a way that preserves environmental values. If Congress intended either of these latter two directions, there is no readily available measure of monetary damages if that duty were breached, unlike in *Mitchell II*. This lack of direction in the statute not only indicates that it does not create a specific fiduciary duty, but also that a breach of any such duty is not of the nature that permits monetary compensation, and thereby confers Indian Tucker Act jurisdiction.

In sum, the Tribe’s failure to identify a money-mandating statute is yet another jurisdictional deficiency that compels dismissal of its breach-of-trust claim against the United States.

CONCLUSION

For the foregoing reasons, the Court of Federal Claim's judgment should be affirmed.

Respectfully submitted,

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ERIC GRANT
Deputy Assistant Attorney General

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**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(a).

This brief contains 10,645 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), according to the count of Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. Cir. R. 28.1 and the type style requirements of Fed. R. App. P. 32(a)(6).

The brief has been prepared in a proportionately spaced typeface in Microsoft Word 2013 in 14-point Garamond.

December 20, 2017

/s/ Amber Blaha
AMBER BLAHA
ATTORNEY FOR THE APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

Counsel for the Appellant is a registered CM/ECF user and service will be accomplished by the appellate CM/ECF system. A paper copy will be mailed to Austin Tighe, Feazell & Tighe LLP, 6618 Sitio Del Rio Boulevard, Suite C101, Austin, TX 78730, at the time paper copies are sent to the Court.

/s/ Amber Blaha

AMBER BLAHA

1
2 **UNITED STATES DISTRICT COURT**
3 **CENTRAL DISTRICT OF CALIFORNIA**
4 **EASTERN DIVISION**

5 AGUA CALIENTE BAND OF CAHUILLA) Case No. 5:13-cv-00883-JGB (SPx)
6 INDIANS,) Judge: Hon. Jesus G. Bernal
7)
8 Plaintiff,) DECLARATION OF EXPERT ASSAD
9) SAFADI IN SUPPORT OF PLAINTIFF-
10 and) INTERVENOR UNITED STATES OF
11 UNITED STATES OF AMERICA,) AMERICA'S CLAIM ON BEHALF OF THE
12 Plaintiff-Intervenor,) AGUA CALIENTE BAND OF CAHUILLA
13 vs.) INDIANS
14 COACHELLA VALLEY WATER)
15 DISTRICT, et al.,)
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1 I, Assad S. Safadi, declare:

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1. I am Senior Vice President of Natural Resources Consulting Engineers, Inc., (NRCE) and have been involved in the quantification of federal reserved Indian water rights throughout the country for almost 28 years. Attached please see resume in Exhibit A.
 2. I have attached Exhibit B which generally describes the method for quantifying the Practicably Irrigable Acreage (PIA) of a Native American Tribe.
 3. I have been retained by the United States Department of Justice since 2014 to describe the methodology of assessing current and future uses for a claim of the reserved water rights for the Agua Caliente Band of Cahuilla Indians in the Coachella Valley.
 4. I have supervised and directed several engineers at NRCE as well as coordinated work by NRCE subconsultants (economist and soil scientist) on the case.
 5. I have attached Exhibit C which describes my analysis for quantifying the federal reserved water rights for the Agua Caliente Band of Cahuilla Indians.
 6. I am not completely finished with my work and my assessment could change with time.
 7. I recommend that the Tribe's annual water amount necessary to meet the current and future uses is 33,608 acre-feet.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on July 10, 2019 in Fort Collins, Colorado.



Assad S. Safadi

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EXHIBIT A



1 Assad Safadi, Ph. D.

2 Senior Vice President

3 Dr. Safadi has over 28 years of experience in Irrigation Engineering. As Senior Vice President of
4 NRCE, his responsibilities include oversight of over 20 technical staff members, the evaluation of
5 irrigation systems, the conceptual and detailed design of water development scenarios, and
investigations of water uses. Dr. Safadi has provided expert witness testimony for several water
rights cases and has also published several papers on various Irrigation Engineering topics.

6 EMPLOYMENT HISTORY

7 Senior Vice President * July 1991 – Present

8 Natural Resources Consulting Engineers, Inc. * Fort Collins, CO

- 9 • Develops models to estimate crop water requirements throughout the
Western U.S.
- 10 • Designs reconnaissance- and feasibility-level on-farm irrigation systems
for several Indian water right cases.
- 11 • Assessed the suitability of surface and groundwater quality for irrigating
agricultural crops in several drainage basins in the Western United
States.
- 12 • Estimated irrigation water requirements, and designed and evaluated
irrigation alternatives for several Indian Reservations.
- 13 • Testified on behalf of the United States on agricultural water use in
Arizona v. Gila River (Arizona, 1995); United States v. Abousleman et al.
(New Mexico, 1996 and 1999); and Washington State Department of
Ecology v. Aquavella et al. (Washington, 1994).
Prepared expert witness reports on crop water requirements in the
Jemez River Basin in New Mexico and in the San Pedro River Basin in
Arizona as part of the Gila River General Stream Adjudication.
- 14 • Provides technical guidance to federal and Tribal attorneys during water
rights litigation and/or negotiation cases.
- 15 • Coordinates the technical work among the various government experts
in the Arizona v. Little Colorado River; United States v. Walker River
Irrigation District; Mannatt v. United States; Soboba v. Metropolitan
Water District, and the United States v. Zuni River litigation cases.
- 16 • Lead technical expert in water rights negotiations for the Pueblos of
Jemez in New Mexico, the Owens Valley Tribes in California, the Moapa
Paiute Tribe in Nevada, Cahuilla Indian Reservation in California, and
the Fort Yuma Indian Reservation in Arizona and California.
- 17 • Expert on beneficial use quantification for the Imperial Irrigation District.
- 18 • Worked with other U.S. expert witnesses in preparation of general
stream adjudications in the Silver Creek and Upper Salt River drainage
basins.
- 19 • Quantifies water claims.

20 Post-Doctorate Researcher/Teacher/Research Assistant * January 1988 – June 1991

21 Utah State University * Logan, UT

22 Calibrated new crop coefficients for use with the Soil Conservation Service's
modified Blaney-Criddle equation for various sites within the State of
Utah.

23 Lectured on crop yield modeling, development of irrigation scheduling
models, and irrigation uniformity/yield interaction for a course on Field
Irrigation Management.

6 EDUCATION

7 Ph. D. Agricultural and 8 Irrigation Engineering

9 Utah State University
Logan, UT 1991

10 M.S. Soils and Irrigation

11 University of Jordan
Amman, Jordan 1987

12 B.S. Soils and Irrigation

13 University of Jordan
Amman, Jordan 1985

14 AWARDS AND HONORS

15 College of Engineering 16 "Distinguished Alumnus," 17 Utah State University, 1998

18 King of Jordan, Top of 19 Class Award

20 University of Jordan, 1987

21 King of Jordan, Top of 22 Class Award

23 University of Jordan, 1985

24 RELEVANT SKILLS

25 Graphics Software

Grapher, Surfer

26 Statistical Software

TSP, Lindo

27 Programming Languages

FORTRAN, BASIC

PROJECTS

1. **Little Colorado River Adjudication, AZ-** NRCE was contracted by the U.S. Department of Justice and the Bureau of Indian Affairs to prepare a comprehensive water development plan for the Navajo, Hopi, San Juan Southern Paiutes, Zuni, and White Mountain Apache Tribes within the Little Colorado River Basin in Arizona. This plan will be the foundation for claims to be filed by the United States on behalf of the Tribes in order to quantify their reserved water rights in the ongoing Little Colorado River Adjudication in Arizona. For purposes of this Adjudication, NRCE also conducted a water use analysis of several irrigation companies in the Silver Creek sub-watershed of the Little Colorado River Basin system. As a result of that study, the United States government objected to the water uses of those irrigation companies. NRCE water use experts have been deposed by lawyers representing the irrigation companies in the Silver-Creek sub-watershed.
2. **Gila River Basin Water Rights Adjudication, AZ-**As part of the Practicable Irrigable Acreage study for the Gila River Indian Community (GRIC), NRCE conducted a surface water supply study of the Gila River Basin upstream of the northwestern corner of the GRIC near Phoenix, just below the confluence of the Gila and Salt Rivers. The study area covers 43,564 square miles in Arizona and New Mexico and includes the Gila, San Pedro, Santa Cruz, Salt, and Verde basins. To estimate the undepleted flows at different points in the study area, NRCE conducted both precipitation-runoff modeling and a water budget analysis. Precipitation-runoff modeling was performed using the model Hydrological Simulation Program Fortran (HSPF) developed by the U.S. Environmental Protection Agency.
3. **Imperial Irrigation District, CA-** As part of the NRCE team, Dr. Safadi was an expert witness for Imperial Irrigation District on beneficial use for IID's application to the California State Water Central Board to transfer water to San Diego. Dr. Safadi analyzed climate water demand for various crops grown in Imperial and Coachella Valleys.
4. **Moapa Indian Reservation, NV-** NRCE conducted the Practically Irrigable Acreage studies for the Moapa Indian Reservation. The studies included analysis of the climatic data to determine the growing season for proposed crops on the Reservation, determination of crop water requirements, analysis of surface water supply, and estimation of non-agricultural water demand. NRCE also evaluated significant depletions to the Muddy River caused by non-Indians. These depletions included irrigation water use, domestic water use, municipal water use, industrial water use, reservoir evaporation, livestock/stockpond water use and transbasin diversions. The evaluation was based on information regarding the irrigated acreage, crop types, regional production reports, diversion and storage facilities and aerial photo review. NRCE investigated census data on Indian and non-Indian populations for demographic projections to determine future non-agricultural water requirements and necessary facilities. Municipal water requirements were based on population growth and per capita water use. Population was projected over the planning horizon based on present data and estimated growth rates for the Reservation. In addition, regional population data was collected to provide growth trends for the general area. NRCE provided technical support to the Tribal attorneys in negotiations which resulted in an agreement with Nevada Water Authority, Muddy River Irrigation Company, Moapa Valley Water Users, and other water users.
5. **Pueblo of Jemez, NM-** NRCE conducted an overall assessment of the water supply requirements of the Pueblo of Jemez over a 50-year planning period. Completed tasks include an assessment of projected water demands and an evaluation of potential water supply resources available to the Pueblo. Existing water supply facilities were also evaluated. Infrastructural improvements, including groundwater development and treatment, conveyance, storage, pumping, and distribution facilities were evaluated and prioritized. Preliminary designs were prepared along with economic and financial assessment of the improvement

plans. Distribution network modeling was conducted to assess the capabilities of the existing public water supply system and to aid in the design of phased improvements. NRCE was contracted by both the U.S. Bureau of Reclamation and the Pueblo of Jemez to complete an integrated river-network model of the Jemez River Basin to support water right negotiations in the *U.S. v. Abousleman* case in New Mexico. The model utilizes the RiverWare software as the model platform, with a custom water rights solver program developed to integrate with RiverWare. The objectives of the modeling effort were to: (1) simulate monthly undepleted flows assuming no depletions in the basin, (2) simulate monthly historical flows and depletions for a 66-year period, (2) simulate current river depletions and groundwater use, and (3) simulate future scenarios of varying water uses and their impacts on stream flows and surrounding water users. The model was developed to conduct a comprehensive accounting of the basin hydrology for each monthly time-step; accounting for upper basin flows, groundwater-surface water interactions, crop water requirements and irrigation return flows, water storage effects, out-of-basin pumping effects, and canal conveyance losses. Model development began in 1994 and continued until 2006. To date, the model continues to be used in water rights negotiations in the Jemez River Basin.

6. **Fort Yuma Indian Reservation, Arizona v. California, CA & AZ-** Dr. Safadi was the lead technical expert in negotiating the additional water rights for the Fort Yuma Tribe. He estimated water demands for crops grown in the Yuma area. The negotiations involved the Tribe, United States, State of California, State of Arizona, and Metropolitan Water District (MWD) of Southern California.
7. **Soboba Indian Reservation, CA-** NRCE on behalf of the U.S. Department of Justice quantified the reserved water rights of the Soboba Indian Reservation. The Soboba Indian Reservation is located in the San Jacinto River Basin in California. The study is comprised of six major tasks: 1) historical water use; 2) surface water and groundwater hydrology; 3) land classification; 4) water requirements; 5) engineering design and analysis; and 6) economic analysis. NRCE performed a preliminary water-budget study of the undepleted flows of the San Jacinto River upstream of the Reservation and of the historical (depleted) and undepleted flows in several tributaries of the San Jacinto River (Bautista Creek, Indian Creek, Poppet Creek, Potrero Creek, and Laborde Canyon). In order to improve the undepleted flow estimates, NRCE performed a surface water modeling study of the San Jacinto River Basin above Mystic Lake using the precipitation-runoff model Hydrologic Simulation Program Fortran (HSPF) Release 11, developed by the U.S. Environmental Protection Agency. Dr. Safadi represented the United States in the successful negotiation of the water rights of the Soboba Tribe. The negotiation involved multiple parties including the Tribe, United States, Metropolitan Water District of Southern California (MWD), Eastern Municipal Water District (EMWD), and other local agencies.
8. **Tohono O'odham Nation, AZ-** NRCE was contracted by the Nation to quantify the historic, present, and future agricultural and non-agricultural water uses for the Sif Oidak District. The agricultural water use quantification took into consideration the land base, water supply from groundwater and surface water, the climate of the District relative to the adaptability of various crops in the region, costs of facilities, and the associated economic return. Damages due to groundwater withdrawal by pumpage outside the District, as well as flooding due to increased urbanization of surrounding areas, were estimated.
9. **Walker River Basin Adjudication, NV-** NRCE is the main project contractor for the Walker River Indian Reservation water rights quantification. On behalf of the United States, NRCE conducted hydrologic evaluation of the available water resources from the Walker River; land arability evaluation; engineering design and cost estimates of an expanded irrigation project on the Reservation including a reservoir, water conveyance system, and distribution system; and the economic study and market analysis for the comprehensive project. NRCE determined the undepleted flow of the Walker River based on available information including gage flows, climatic conditions, irrigated land acreage, irrigation practices, and reservoir storage levels. NRCE also developed a comprehensive water rights hydrologic model for the Walker

River Basin, including the management of two major surface water storage reservoirs and several hundred water rights with various priority dates. This model was developed as a tool to allocate the available water resources based on the documented water rights and to determine the remaining flows available for use on the Walker River Indian Reservation and for Walker Lake. Using the water rights model, a time series of flows was developed to assist in the irrigation development plan.

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- Safadi, A.S. "Yakima River and its Tributaries' Depletions, Yakama Indian Reservation, Yakima, Washington." Prepared for the U.S. Department of Justice, Washington, D.C., November 28, 1994.
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- Safadi, A.S. "Comparison of Water Use Efficiency Under Drip, Sprinkler, and Gravity Irrigation Systems." Paper Presented to the University of California Cooperative Extension Service, Hotville, California. 1990.
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- Safadi, A.S. and Battikhi, A.M. "A Preliminary Study on the Effects of Soil Moisture Depletions Under Black Plastic Mulch and Drip Irrigation on Root Growth and Distribution of Squash in the Central Jordan Valley." DIRASAT, University of Jordan, Amman, Jordan. 1998.
- Safadi, A.S. "Irrigation Scheduling of Squash Under Drip Irrigation and Black Plastic Mulch in the Central Jordan Valley." M.S. Thesis, University of Jordan, Amman, Jordan. 1987.

EXHIBIT B

Practically Irrigable Acreage (PIA) Overview

Practically Irrigable Acreage (PIA) is a methodology used to quantify the Federal reserved water rights claims of Native American tribes to ensure that sufficient water is available to tribes in order to maintain their Reservations as a permanent homeland for the Tribe and its members for now and forever.

The basis for Federal reserved water rights for Tribes is the landmark 1908 U.S. Supreme Court case *Winters v. United States*. This case held that when land reservations were established for Indian tribes, sufficient water was also implicitly reserved for tribes to fulfill the purposes of the reservation. Further, the court determined that the priority date of these rights under the prior-appropriation system would be the date of Reservation establishment. The only time the U.S. Supreme Court has ruled on quantifying *Winters* rights was in *Arizona v. California* (1963), wherein they adopted the PIA method utilized by the Special Master in the case as the yard stick for quantifying the tribal water rights. This PIA standard assumes that irrigated agriculture will be the primary use of water on the Reservation, and therefore quantifying how much irrigation can take place based on the arable land base and irrigation project feasibility should provide sufficient water rights to sustain the tribe on a Reservation. The Special Master also stated that although the basis for quantification was irrigated agriculture, he believed the water rights could be used for other purposes. The PIA standard was also applied in Wyoming in the Big Horn River adjudication. It is worth mentioning that water supply was not the limiting factor in both these cases.

Calculation Method

The purpose of a PIA analysis is to develop feasible irrigated agriculture projects to utilize arable lands on a Reservation, and to quantify the amount of water necessary to support such irrigation projects. A PIA analysis is similar to a feasibility study of a proposed irrigation project on the Reservation. A PIA analysis involves studies of climate, soils, crops, water supply and quality, engineering design, agricultural markets, and project economics.

Step #1: Define Reservation Resources

Soils are evaluated in order to define the arable lands on the Reservation. At a reconnaissance-level, county soil survey data on irrigation capability are reviewed. More detailed field investigations are then undertaken for select areas by drilling soil boreholes and classifying the soils in terms of long-term suitability for irrigated agriculture. Factors such as soil texture, permeability, and chemical composition are considered to determine lands which are “arable”.

Climate data are evaluated for crop selection and to estimate the irrigation requirements for the various crops. Crop evapotranspiration (ET) represents the amount of water uptake and use by a specific type of crop under specific climate conditions, and is calculated based on climate data from nearby weather stations and crop coefficients which simulate the unique growing season characteristics each crop type. Irrigation requirements within the crop root zone are estimated as the difference between crop ET and natural rainfall. Irrigation requirements from a water source (river, aquifer) are estimated by considering losses that occur in conveying irrigation water from the source to fields, and in applying water to the field.

Water supply data are evaluated to estimate the sustainable water supply available to a theoretical tribal irrigation project. Streamflow and groundwater level measurement data from the U.S. Geological Survey

are often a primary data resource for evaluating water supply, but these measurements are inherently affected by upstream water uses. Therefore, a natural, or undepleted, flow analysis is often undertaken to understand the water resource conditions of the Reservation at the time it was established for the tribe. This natural flow estimate can be used as the water supply available for the tribe.

Step #2: Design Irrigation Project(s)

Once the Reservation resources are defined, sufficient information is available to design a conceptual irrigation project on the Reservation. At the field level, analyses of crop mix, irrigation application type, and irrigation requirements are completed. Preliminary engineering designs are then developed for all major components of the project, including: diversion structures or wells, canals and pipelines, field turnouts, land grading and leveling, irrigation equipment, drain pipes, and other items. The design is used to estimate capital construction costs and annual operation and maintenance costs for the irrigation project.

Step #3: Evaluate Economics of Irrigation Project(s)

Agricultural economic analyses of crop markets and project benefits are completed to evaluate the feasibility of the conceptual tribal irrigation project. Project benefits typically include net revenue from crop sales and tribal employment. Project benefits are compared with engineering design costs to evaluate project feasibility, or whether the irrigation project is “practicable”. The project is feasible when the benefit to cost ratio is larger than 1.

Step #4: Quantify Tribal Water Rights

The three preceding steps produce the necessary information to quantify a Federal reserved water right for the tribe using the PIA standard. The diversion requirement and net consumptive use of the conceptual irrigation project(s) on the Reservation are used to quantify the Tribal water right, as long as the project(s) are estimated to result in net economic benefits. The Tribal water rights claim may also include additional water demands outside of the PIA analysis, such as water for domestic and commercial uses, for instream flows, or for present and historic irrigated agriculture.

The PIA is usually limited by available water supply (under natural conditions), available arable lands, and crop economics

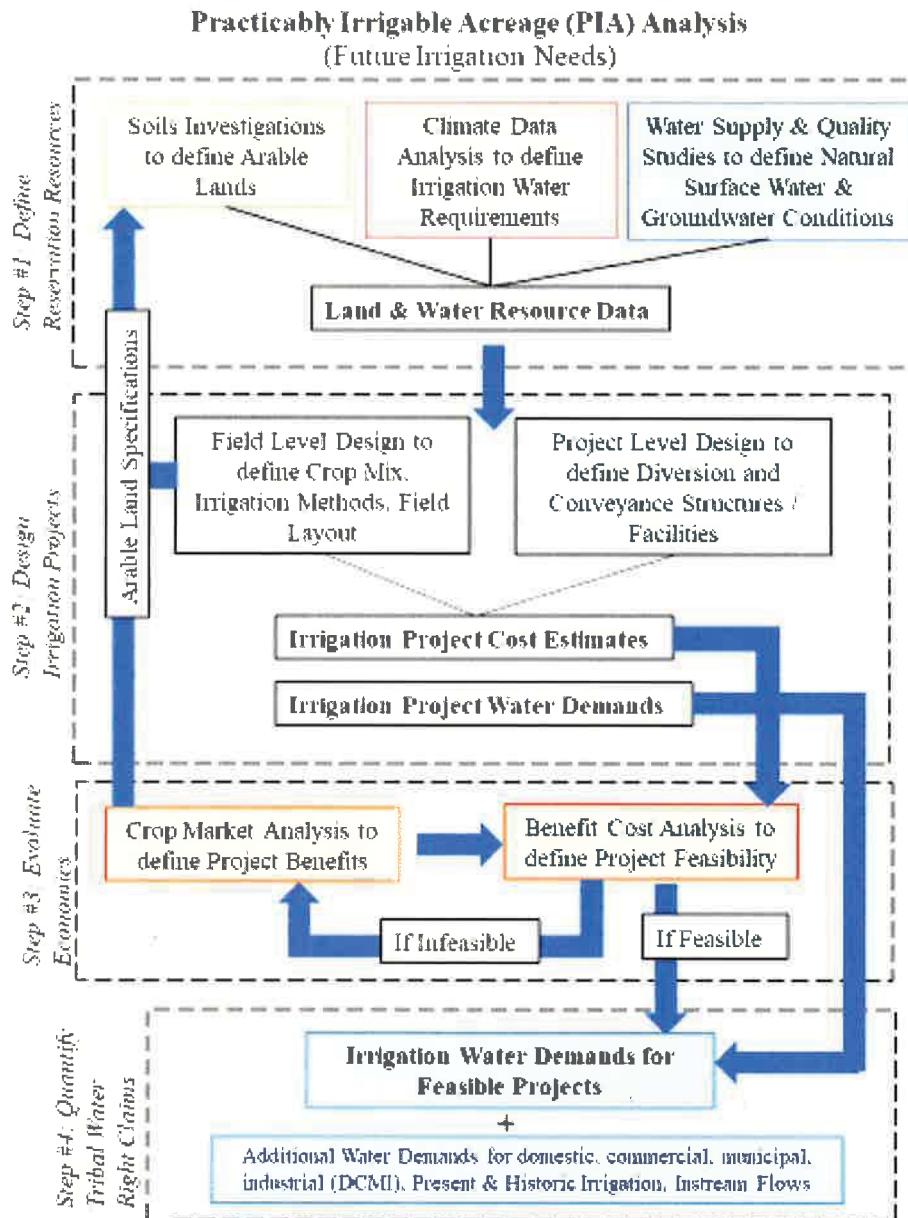


EXHIBIT C

12/32

Assad Safadi Decl. ISO
U.S.'s Claim for Agua Caliente Band
Exhibit C
No. 5:13-cv-00883-JGB (SPx)



Agua Caliente Band of Cahuilla Indians Estimated Water Right Claim Present Status

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EXECUTIVE SUMMARY

This report is a summary of the preliminary assessment of the water claim estimates for the Agua Caliente Band of Cahuilla Indians (Tribe) located in the Whitewater River Basin in southern California. These estimates were developed under contract with the Bureau of Indian Affairs Pacific Region and the US Department of Justice. The claim estimates provided here are subject to change upon finalization of the various analyses.

Water rights claims were estimated for three claim categories: historically irrigated acreage (HIA), practicably irrigable acreage (PIA), and domestic, commercial, municipal, and industrial (DCMI). Each is summarized below.

- The HIA made use of historical areal imagery to identify the total area historically irrigated by groundwater on the Reservation, excluding golf courses. The total area was 201 acres. The total HIA water claim is **1,340 afy**.
- The PIA claim included an economic analysis of crop production and irrigation infrastructure. Crops included alfalfa/sweet potato rotation, mixed vegetables with oat cover crop, specialty citrus, lemon, table grape, and date palm. Palm/oleander windbreaks were also included for some areas. Crop water demand and groundwater supply were considered. The total feasible irrigated PIA area including wind breaks was 4,425 acres. The total PIA diverted water claim is **25,070 afy**.
- The DCMI claim was divided into three components 1) present population-based, 2) future population-based, and 3) present golf courses. The current and future population of the reservation were considered. Water use rates were based upon urban water management plans for the Coachella Valley Water District (CVWD) and the Desert Water Authority (DWA).
 - The estimated per capita present water use was 273 gpcd. The present permanent population of 546 and seasonal population of 243. Therefore, the present DCMI water claim is **241 afy**.
 - The estimated future per capita water use was 349 gpcd. The future population was 2,077 with a seasonal population of 924. Therefore, the total future DCMI water claim is **1,173 afy**.
 - The estimated total area in golf courses at present is 943 acres, with 886 acres estimated to be irrigated. Using the CVWD water duty of 6.8 afy, the present golf course claim is **6,025 afy**.

The total water claim for the HIA, PIA, future-population-based DCMI, and golf courses is: **33,608 afy**.

INTRODUCTION

I have been contracted since 2014 by the Bureau of Indian Affairs (BIA) Pacific Region and the US Department of Justice (DOJ) for developing a litigation-level water rights claim for the Agua Caliente Band of Cahuilla Indians (Tribe) located in the Whitewater River Basin in southern California. In addition to working with my own team, I subcontracted with a soil scientist, an agronomist, and an economist. This water rights claim development summary report is intended to provide the present status of technical analyses in support of the Historically Irrigated Acreage (HIA), Practically Irrigable Acreage (PIA), and Domestic, Commercial, Municipal, and Industrial (DCMI)water rights claims of the Tribe. The claim estimates provided here are subject to change upon finalization of the various analyses.

HISTORICALLY IRRIGATED ACREAGE (HIA)

The HIA was quantified by examining historic aerial land surface imagery.

Identification of Historically Irrigated Acreage Using Aerial Imagery

Historically irrigated areas were identified by examining historic land surface imagery. Historic land surface images were obtained from multiple sources (Table 1). Aerial land surface imagery was obtained for 1939, 1954 and 1955, 1965 and 1967, and 1972. The total area identified in the different imagery datasets ranged from 15 acres in 1954-1955 to 369 for 1972. The composite total area from the imagery analysis was 465 acres (Table 1). However, when HIA areas that overlap DCMI present golf courses are removed, only about 201 acres remain (Table 1). These 201 acres are the area used for the HIA water use estimate.

Water Demand for Historically Irrigated Lands

The water demand for the historically irrigated areas identified in above was taken to be 6.67 acre-ft per acre per year. Thus, the water diversion demand associated with the 201 acres of historically irrigated land would be **1,340 afy**.

Table 1. List of Aerial Land Surface Imagery Sources Used to Quantify Historically Irrigated Acreage.

Year	Organization	Data Source	Area (acre)
1939	U.S. Department of Agriculture Agricultural Adjustment Agency	University of Santa Barbara Library	58
1954-1955	U.S. Navy, Army Map Service	U.S. Geological Survey	15
1965	California Water and Telephone Company	University of Santa Barbara Library	68
1967	Aerial Map Industries	University of Santa Barbara Library	369
1972	Aerial Map Industries	University of Santa Barbara Library	465
Composite (areas included in at least one of the above sets of imagery)			201

PRACTICABLY IRRIGABLE ACREAGE (PIA)

Methods and results of the PIA analyses are presented below.

Groundwater Supply and Flow Model

Groundwater Supply

The Reservation lies within the Indio Sub-basin, as defined by the California Department of Water Resources (CDWR), which covers the majority of the Coachella Valley. About half of the Reservation lands lie within the Indio Sub-basin aquifer, while the remainder of the Reservation is underlain by rocks on the flank of the San Jacinto Mountains.

The groundwater levels underlying the Reservation have undergone substantial drawdown, estimated at approximately 100 feet over the period 1936 to 2009, and varying from about 40 feet in the northwest to about 150 feet in the southeast portions of the Reservation. Even after considering this drawdown, the remaining aquifer resource is substantial, as the estimated saturated thickness of the aquifers underlying the Reservation is at least 1,000 feet (Swain, 1978; Reichard and Meadows, 1992).

Recharge to the aquifer comes from Whitewater River and Palm Canyon Wash seepage, as well as direct mountain-front recharge in the western canyons. The annual mountain-front recharge within the western canyons is estimated at about 6,200 acre-feet per year. The Whitewater River, Chino Canyon Creek, Mission Creek, Falls Creek, and Snow Creek north of the Reservation are estimated to provide about 17,600 acre-feet per year of recharge (Swain, 1978). In addition, underflow from the San Gorgonio Pass Subbasin is estimated at 13,000 acre-feet per year to the aquifer under natural conditions, and before the construction of the San Jacinto Tunnel (Swain, 1978). After the tunnel was constructed in 1940, the underflow from San Gorgonio Pass gradually reduced from 13,000 to 9,000 acre-feet per year from 1936 to 1976 (Tyley, 1974), and stabilized at 9,000 acre-feet per year thereafter. Therefore, the average annual total groundwater recharge can be estimated to be up to 36,800 acre-feet.

Groundwater Flow Model

A numerical groundwater flow model was developed as part of the PIA analysis to determine the sustainability of PIA irrigation projects based on natural groundwater availability. The model simulates the upper Indio Subbasin (including the Whitewater and Garnet Hill Subbasins) from the northwest end of the subbasin near Whitewater, to about 3 miles northwest of Indio at the southeast boundary.

The numerical groundwater model was constructed to estimate the effects of different water use and pumping scenarios for the water rights claim. The model employs the USGS MODFLOW code within the Groundwater Vistas (Environmental Simulations, Inc., Leesport, PA) graphical user interface.

Pre-development inflow and outflow conditions were assumed throughout the transient simulation except as affected by natural precipitation rates and PIA water use scenarios to be conducted using the model. Groundwater inflow and outflow are specified values derived from published sources. Historical and present-day groundwater uses (outflows) were not represented in the model.

The groundwater flow model was subdivided horizontally into a grid of 183 rows and 94 columns containing 17,202 grid nodes in a single layer of which 1,267 are active. The groundwater model was originally constructed with a fixed-width grid of 2,000 feet x 2,000 feet. The grid width was subsequently refined to 1,000 feet x 1,000 feet over the area of the Reservation. A constant flux boundary condition was used to represent inflow from the San Gorgonio Pass Subbasin at the northwest and through the Banning Fault from the Mission Creek Subbasin to the east.

The steady-state calibration of the model was based on replication of pre-development head conditions within the basin. The steady state model simulates pre-development natural groundwater recharge and inflow conditions prior to 1936 and assumes estimated groundwater inflow from the San Gorgonio Pass Subbasin as it was estimated to exist prior to construction of the San Jacinto Tunnel. Steady state calibration was accomplished by adjustment of initial hydraulic conductivity parameters by use of an automated parameter estimation code (PEST). Computed head errors for the steady state model are within 1% of observed values.

Recharge in the steady-state and transient groundwater models of the upper Whitewater River and Garnet Hill Subbasins occurs primarily as: 1) infiltration of runoff from the San Bernardino, Little San Bernardino, San Jacinto, and Santa Rosa mountain ranges, 2) seepage losses from Whitewater River and its tributaries, and 3) underflow from San Gorgonio Pass and Mission Creek Subbasin.

The transient model simulates the period between 1936 and 2015 with the first stress period representing pre-development conditions (steady state conditions) and subsequent quarterly stress periods representing the period 1936 to 2015 (transient conditions). Recharge was varied relative to steady state recharge throughout the transient period in proportion to measured precipitation.

The model was used to estimate projected drawdown for each well in the proposed PIA irrigation well layout to determine optimum well construction parameters for estimation of well construction costs. This method of well optimization incorporates the effects of well interference and the long-term effects of groundwater depletion and the resulting head decline across the wellfield. For the model, the average annual well discharge rate was applied at each designated well location in the PIA scenario for a 100-year simulation underestimated actual recharge conditions from 1936 (end of the pre-development period) to 2015 and steady state conditions thereafter. Since the model has one layer, return flow from the PIA irrigation projects was subtracted from the simulated pumping rates. Return flow was assumed to be 80% of the leaching requirement and assumed inefficiencies.

Land Classification

A feasibility level land classification of Reservation (Tribal Trust and Tribal Fee) lands was conducted by a soil scientist to categorize the lands as arable or non-arable. The arable lands were classified as being Class 1 – 4, 1 being the most suitable for crop development. Non-arable lands were classified as Class 6. Land classifications were assigned separately for row crops and permanent crops. The land classification was performed representing “predevelopment” conditions. This condition does not account for urban and other developments that have occurred.

The predevelopment land classification was used in developing the PIA water demand estimates. A total of 27,916 acres were classified on the reservation, excluding areas in a right of way (Table 2). Of those 27,916 acres, 6,926 acres were classified as arable for field crops and 7,342 acres were classified as arable for permanent crops.

Table 2. Summary of Classified Lands Used in the Practicably Irrigable Acreage Analysis.

Land Class	Classified Area (Acres)	
	Field Crops	Permanent Crops
1	0	0
2	0	258
3	6,393	7,084
4	534	0
6 (Non- Arable)	19,406	18,990
Total Arable	6,926	7,342
Outliers	1,493	1,493
Right of Way	91	91
Total	27,916	27,916

Crop Selection

The crops considered for the PIA study were selected by the project economist and agronomist in cooperation with other project members.

Due to the climatic conditions and coarse textured soils, the primary practical crops considered were citrus, table grape, and date palm. The permanent crops included in the PIA study were table grape, lemon, date palm, and specialty citrus.

Field crops included an alfalfa/sweet potato rotation and mixed vegetables. The mix of vegetables proposed for small-scale gardens include peppers, eggplant, tomatoes, broccoli, cauliflower, cabbage, and carrots. The mixed vegetables would be grown in the winter with a cover crop of oats grown in the summer.

Crop Water Requirements for Practicably Irrigable Lands

Crop water requirements were calculated for the proposed PIA cropping systems on the Reservation lands as described in the following subsections.

Crop Evapotranspiration

Crop evapotranspiration (ET_c) was estimated using a mean crop coefficient approach. ET_c is calculated by multiplying a crop coefficient (K_c) by calculated reference evapotranspiration (ET_o , for a short – grass – reference crop).

Reference Evapotranspiration and Weather Data

Reference evapotranspiration (ET_o) was calculated using the ASCE Standardized Reference Evapotranspiration Equation (ASCE, 2005) for a short reference crop. ET_o is computed using weather data. Climate data used for the calculation of daily ET_o was acquired from weather stations operated by the California Irrigation Management Information System (CIMIS). Weather stations used included Cathedral City (CIMIS station 118), La Quinta II (CIMIS station 208), Indio 2 (CIMIS station 200), and Oasis (CIMIS station 136).

The Cathedral City station was located within the arable Reservation lands that are part of the PIA project. It logged weather data from December 1995 through January 2014. With the exception of wind speed, historical weather data from this station was used for ET_o calculations.

Wind speed data recorded at the Indio weather station were used for ET_o calculations. The average wind speed for each day of the year from the Indio station from January 2000 through January 2016 was used in calculating ET_o .

Average monthly precipitation values were acquired from the Western Regional Climate Center for the National Weather Service Global Historic Climate Network station 046635 in Palm Springs which had a precipitation record from 1906 through 2016.

Crop Coefficients

Crop coefficients (K_c) vary with crop type and growth stage. K_c values as reported in Snyder et al. (1994) were used for citrus, carrot, and alfalfa. K_c s for the remaining crops were obtained from Allen et al. (1998). For the mixed vegetables, the K_c was based upon K_c s for cabbage, broccoli, cauliflower, carrots, pepper, eggplant, tomato, lettuce, and green bean. A K_c for the oat cover crop was also incorporated for the mixed vegetables. Annual ETc ranged from 38.0 in. for sweet potato to 68.6 in. for palms (Table 3).

Table 3. Average Monthly and Annual Reference and Crop Evapotranspiration Estimates for the Agua Caliente Reservation.

Month	ET_o (in.)	ET_c (in)							
		Grape	Lemon	Spec. Citrus	Date Palm	Palms ¹	Mixed Vegs ²	Alfalfa	Sweet Potato
Jan	3.1	2.3	1.7	1.7	2.7	2.9	3.5	2.5	0.0
Feb	3.1	2.8	1.8	1.8	2.8	3.0	3.6	3.3	0.0
Mar	5.1	4.6	2.9	2.9	4.5	4.9	5.9	4.8	0.0
Apr	6.4	5.8	3.6	3.6	5.9	6.2	6.5	6.0	3.4
May	8.1	6.5	4.6	4.6	8.0	8.0	2.4	7.8	8.2
Jun	9.1	6.4	5.1	5.1	9.0	9.0	5.8	8.8	10.5
Jul	8.4	5.9	4.7	4.7	8.3	8.3	9.6	8.2	9.5
Aug	7.9	5.5	4.4	4.4	7.7	7.7	0.0	7.6	6.5

19/32

Assad Safadi Decl. ISO
U.S.'s Claim for Agua Caliente Band
Exhibit C
No. 5:13-cv-00883-JGB (SPx)

Sep	7.1	5.0	4.0	4.0	7.0	7.0	5.0	6.4	0.0
Oct	5.7	3.6	3.2	3.2	5.3	5.5	4.0	6.6	0.0
Nov	3.7	2.3	2.1	2.1	3.3	3.5	3.5	3.2	0.0
Dec	2.9	1.8	1.6	1.6	2.5	2.7	3.3	3.3	0.0
Annual	70.7	52.5	39.6	39.6	66.9	68.6	53.1	68.4	38.0

²Palms grown for windbreaks.

¹Mixed vegetables includes an oat cover crop grown in the summer months.

Effective Precipitation, Salt Leaching, and Irrigation Diversion Requirement

The net irrigation requirement (NIR) is the amount of irrigation water required after accounting for water contributed by precipitation during the growing season. Effective precipitation (P_e) is the portion of rainfall that becomes available for crop transpiration. A procedure developed by the U.S. Bureau of Reclamation (Jensen, 1993) was used to compute P_e . NIR was then calculated as:

$$NIR = ET_c - P_e$$

The presence of dissolved salts in both irrigation water and in soil water solution in the soil profile necessitates additional water application to flush accumulated salts out of the root zone. The fraction of water required to leach salts, or leaching fraction (LF) was computed using the method of Ayers (1985):

$$LF = \frac{EC_{iw}}{5 * EC_e - EC_{iw}}$$

where EC is electrical conductivity (dS/m) and the subscripts iw and e represent the irrigation water and saturated extract of the soil, respectively.

A simple method of computing crop irrigation requirements (CIR), is to apply the LF directly to the NIR as:

$$CIR = \frac{NIR}{1 - LF}$$

The CIR estimates are presented in Table 4.

Table 4. Average Monthly and Annual Total Crop Irrigation Requirements and Eighty Percent Exceedance Effective Precipitation for the Agua Caliente Reservation.

Month	P_e (in.)	CIR (in.)							
		Grapes	Lemons	Spec. Citrus	Date Palms	Palms ¹	Mixed Veggies ²	Alfalfa	Sweet Potato
Jan	0.02	2.5	1.8	1.8	2.7	3.0	3.9	2.4	0.0
Feb	0.00	3.0	1.9	1.9	2.8	3.0	4.0	3.2	0.0

Mar	0.00	5.0	3.1	3.1	4.6	5.0	6.6	5.0	0.0
Apr	0.00	6.2	3.8	3.8	6.0	6.3	7.2	6.3	3.6
May	0.00	6.9	4.8	4.8	8.2	8.2	2.7	8.2	8.7
Jun	0.00	6.9	5.4	5.4	9.2	9.2	6.4	9.2	11.3
Jul	0.00	6.3	5.0	5.0	8.5	8.5	10.7	8.6	10.1
Aug	0.00	5.9	4.7	4.7	7.9	7.9	0.0	8.0	6.9
Sep	0.00	5.3	4.2	4.2	7.1	7.1	5.5	6.7	0.0
Oct	0.00	3.9	3.4	3.4	5.5	5.7	4.5	6.9	0.0
Nov	0.00	2.5	2.2	2.2	3.4	3.6	3.9	3.3	0.0
Dec	0.01	1.9	1.7	1.7	2.6	2.8	3.7	3.3	0.0
Annual	0.03	56.3	42.0	42.0	68.5	70.2	59.2	71.1	40.7

²Palms grown for windbreaks.

¹Mixed vegetables includes an oat cover crop grown in the summer months.

Diversion Requirement

The total diversion requirement includes conveyance and on-farm irrigation system losses. For this study, the conveyance network was composed of buried pipelines. The conveyance efficiency was assumed to be 95%. The on-farm irrigation system application efficiency assumed varied by irrigation method. The irrigation application efficiency was assumed to be 90% for both low energy precise application (LEPA) center pivots and for driplines (Solomon et al. 2007), for an overall efficiency of 85.5%. On-farm efficiency was estimated to be 85% for micro-sprinkler irrigation, for an overall efficiency of 80.75%. The resulting diversion requirements are presented in Table 5.

Table 5. Average Monthly and Annual Diversion Requirements for the Agua Caliente Reservation.

Crop:	Grapes	Lemons	Spec. Citrus	Date Palms	Palms ¹	Mixed Veggies ²	Alfalfa	Sweet Potato
Efficiency:	80.75%	80.75%	80.75%	80.75%	80.75%	85.50%	85.50%	85.50%
Month	<i>Diversion Requirement (in)</i>							
Jan	3.1	2.2	2.2	3.4	3.7	4.6	2.8	0.0
Feb	3.7	2.3	2.3	3.5	3.8	4.7	3.7	0.0
Mar	6.1	3.8	3.8	5.7	6.2	7.7	5.8	0.0
Apr	7.6	4.7	4.7	7.5	7.8	8.4	7.4	4.3
May	8.6	6.0	6.0	10.1	10.1	3.2	9.5	10.2
Jun	8.5	6.7	6.7	11.4	11.4	7.5	10.8	13.2
Jul	7.8	6.2	6.2	10.5	10.5	12.5	10.0	11.9
Aug	7.3	5.8	5.8	9.8	9.8	0.0	9.4	8.1
Sep	6.6	5.2	5.2	8.8	8.8	6.5	7.8	0.0
Oct	4.8	4.2	4.2	6.8	7.0	5.3	8.1	0.0
Nov	3.1	2.7	2.7	4.2	4.5	4.5	3.9	0.0
Dec	2.4	2.1	2.1	3.2	3.5	4.3	3.8	0.0
Annual	69.7	52.0	52.0	84.8	87.0	69.2	83.1	47.7

²Palms grown for windbreaks.

¹Mixed vegetables includes an oat cover crop grown in the summer months.

Peak Period Irrigation Requirements

Irrigation systems must be sized appropriately to handle water needs during the peak water use period. Peak irrigation requirements are dependent on the characteristics of soils and crops.

Engineering Design and Cost Estimation

Wells and Pumps

Groundwater well sites were selected based on peak water requirements and geographic layout of parcels so as to minimize the cost of wells, power supply, and distribution pipelines. Groundwater barriers were avoided in favor of areas with high yield potential. Wells were designed such that the maximum pumping rate was equal to the peak water flow rate of the parcel (or group of simultaneously irrigated parcels) with the largest water requirement.

Well Construction

Well construction estimates were obtained from a company that constructs wells in the Coachella Valley. These cost estimates were scaled (based on bore hole depth) for all wells in the present study. Well diameters were designed to accommodate the design pump.

Pump Selection

Pumps were sized to deliver the necessary flow and pressure to the parcels served by the respective well. The pressure output a pump is described in terms of total dynamic head (TDH). This is the sum of the maximum pressure requirements for the served parcels, the depth to the static water level, the 100-year maximum water drawdown in the well simulated using the groundwater flow model, elevation differences between the well and the parcels, and friction losses in the pump column and conveyance pipes and fittings.

Prices for vertical turbine pumps were based on an estimate obtained from a pump company. Costs for pump installation and related equipment was taken to be \$15,000.

Power Supply

To minimize the cost of supplying power to groundwater wells, the wells were sited to limit the distance to existing distribution power lines while simultaneously limiting the length of conveyance pipelines and maintaining a large distance (greater than 2,000 feet) between wells (to limit drawdown). If an above ground power line was located near the well, the distance from the well to the power source was assumed to be the distance to the nearest pole along the power line. If there were no above ground power lines near the well, the distance from the well to the power source was assumed to be the distance to the center of the nearest road lined with homes or businesses plus an additional 300 feet. Electrical equipment, material, and installation costs were obtained from relevant companies.

Conveyance System Design

Distribution pipelines between wells and parcels were designed to stay on Reservation land and limit unnecessary elevation gains to the extent possible while also minimizing the total length of pipelines. Many distribution lines were designed to serve multiple parcels to reduce costs.

Material and installation costs for distribution lines that served multiple parcels were shared between the parcels and were prorated based on the acreage of each parcel. Costs of the sections of the distribution line that were not shared were fully allocated to the parcel served. Unit costs for pipe were obtained from a supply company. Installation costs were obtained from a consultant familiar with irrigation systems in the area. Cost estimates of miscellaneous equipment, including PVC fittings, valves, flowmeters, controllers, and other supplies, were obtained from Schwankl et al. (1999), and were indexed to April 2017 values according to U.S. Bureau of Reclamation (USBR) composite construction cost trends (USBR 2019).

On-Farm Irrigation Design

Irrigated parcels were designed through a multi-step process. Permanent crops were designed to be irrigated by micro-sprinklers in order to maintain cover crops, mixed vegetable crops were designed to be irrigated through drip irrigation, and the alfalfa/sweet potato rotations were designed to be irrigated by LEPA center pivots.

Irrigated parcels were delineated in QGIS using the following criteria: 1) parcels were to be on Tribal Trust or Tribal Fee Lands classified as arable in the land classification; 2) parcels on lands classified as having a rare estimated overflow frequency (1 in 10 year flooding) must be protected by levees and/or the expected crop yield and infrastructure losses due to flooding must be compensated for in the economic analysis; 3) only rectangular or triangular parcels were specified to facilitate design automation; and 4) parcels were split into multiple subunits (divided by windbreaks where necessary) to reduce required flow rates.

Irrigation Equipment Selection

Micro-spray emitters were selected for each type of permanent crop based on the row and plant spacing. Cover crops were incorporated for table grape due to beneficial cooling effects and prevention of soil erosion. To ensure uniform irrigation of cover crop, micro-spray emitters were selected such that the larger of the row spacing or plant spacing was less than 90% of the maximum spray radius. Table grape were to be irrigated by a combination of overhead sprinklers and drip irrigation. Price quotes were received from a sales representative for emitters and staking assemblies.

The permanent and mixed vegetable crop designs incorporate irrigation laterals (tubing) and driplines, respectively. (Table grape were irrigated by both drip lines and overhead micro-sprinklers.) Efforts were made to minimize the lateral diameter to decrease costs.

Prices for lateral tubing and dripline were obtained from a manufacture. An estimated installation cost of \$700 per acre was provided by a consultant familiar with the area.

Drip and Micro Irrigation Manifold Design

Rectangular parcels were designed to be served by manifolds that had laterals of equal length extending in both perpendicular directions. In the design of triangular parcels, there was a mix of this type of design and of manifolds supplying laterals on only one side of the manifold. Manifolds were tapered (reduced in diameter along the manifold length). Cost sources for manifolds were the same as described for the main conveyance pipelines.

Center Pivot Design

Center pivots were designed for the alfalfa/sweet potato rotations. The center pivots were designed for sweet potatoes due to their larger peak period water requirement. LEPA bubblers on a 40" spacing were specified in the design to limit losses to wind drift and evaporation, and to reduce pressure requirements. Price quotes for the center pivots were obtained from a pivot dealer including material, freight, and installation.

Land Preparation

Land preparation costs include tree and shrub removal, rock and cobble removal, levee construction, trellises for table grape, and vegetative windbreaks. Tree and shrub removal cost estimates were obtained from RSMeans (2015) and indexed to April 2017 values according to USBR composite construction trends (USBR 2019). Rock and cobble removal estimates are based on the Environmental Quality Incentive Program (EQIP) Conventional Cost Share Payment Schedule (NRCS 2016). A per acre cost for trellises for table grape was obtained from Wunderlich et al. (2015) and indexed to April 2017 values according to USBR composite construction trends (USBR 2019).

Levee Design

Flooding was another land factor considered in the PIA analysis. A hydrologic analysis was conducted to determine the flood frequency of all the gauged tributaries upstream of the Reservation. The Upper Whitewater River is the tributary with the largest flood potential. Irrigated parcels designed on lands classified as having rare overflow frequency by the soil scientist were within the floodplain of the Whitewater River and were protected by levees designed for a 50-year flood. The 50-year flooding event for the Upper Whitewater River is 42,990 cfs. A channel and levee required to contain this flow rate was designed for this study with a 20% safety margin (51,588 cfs). An existing levee on the south side of the floodplain, which is about 6 feet tall, was utilized in the design. The required width of the channel necessary to contain a 50-year flooding event was estimated as 962 feet through a hydraulic analysis. Levees were designed as 12 feet wide (on top) and 6 feet tall with 45-degree slopes on both sides. Costs include earth work and the hauling and machine placement of 18 in. minimum thickness rip rap. These costs were obtained from RSMeans (2015) and indexed to April 2017 values according to USBR composite

construction trends (USBR 2019). Levee costs were distributed between the protected parcels and were prorated based on parcel area.

Windbreak Design

Vegetative wind breaks were specified for some areas of the reservation because of high wind conditions. Wind data from the La Quinta, La Quinta II, Indio, and Indio II CIMIS stations were used to identify areas requiring wind break protection. Data from the Palm Springs Regional Airport Automated Surface Observing Systems station was also used in this analysis.

When comparing the average annual wind speeds of these different stations, it was clear that the proximity of mountains to the west had a great influence on wind speed. For example, the average wind speed at the La Quinta stations was about 3.4 mph while it was about 6.1 mph at the Indio and Palm Springs Regional Airport stations. It was therefore determined that designed PIA parcels in the southwest portion of the study area would not require windbreaks. However, those parcels in the north east would need windbreaks.

The width of each wind break was specified to be 40 feet, including a 15 ft. wide access road and an irrigated width of 25 ft. for the windbreak vegetation. The maximum spacing allowed between windbreak rows was 300 feet. Rectangular fields that required windbreaks were oriented such that crop rows were in the north-south direction, with manifolds running in the east-west direction. Windbreaks were positioned along western boundaries and protecting from northern winds (Figure 2). Wind barriers for parcels irrigated by center pivots were designed as a quarter arc along the northwestern border of the fields. Farm access roads were designed around the entire perimeter of center pivot parcels and one road from the outer edge to the center.

In addition to windbreaks, the cropped area of all but center pivot irrigated fields was further reduced by 2% to allow for equipment storage.

Operation and Maintenance Costs

Estimated operation and maintenance costs include the electricity, labor for irrigation, and maintenance of all materials in the design.

Cost of Electricity

A rate schedule for large scale agriculture and pumping was obtained for the electric power supplier Southern California Edison. The operating costs related to electricity requirements for pumping groundwater are made up of five components. The energy charge for each well was estimated by calculating the total amount of energy needed to pump the total amount of water required for all of the parcels served. Other charges, including meter, demand, and power factor charges were also applied. A voltage discount was estimated by assuming the distribution lines operate between 2 and 50 kV. All components of the operating costs related to electricity were prorated amongst the parcels served by a given well based on acreage.

Labor Costs

Labor costs related to irrigation were split into labor during the irrigation season and labor before and after the irrigation season. The number of man hours of labor during the irrigation season was estimated as a function of the estimated number of irrigation events and the acreage of each parcel using estimates provided in Keller and Bliesner (1990). Similarly, the number of man hours of labor before and after the irrigation season was estimated for each parcel based on the acreage of the parcel. Labor costs were estimated to be \$20 per hour by the project economist.

Maintenance and Economic Life

The required maintenance and economic lives of materials used in the PIA design were estimated based on multiple sources. The maintenance and economic lives of most of the materials that actually transmit water, including center pivots, micro-spray emitters, drip lines, laterals, buried PVC (manifolds and conveyance), pumps, and wells, were estimated based on suggestions from Keller and Bliesner (1990). Annual maintenance was estimated as a percent of the cost and economic lives ranged from 15 to 30 years depending on the component.

Cost-Benefit Analysis

Economic benefits from crop production were provided by the project economist. The final PIA areas were identified as those for which the benefit cost ratio exceeded 1.0 for all other crops.

PIA Water Claim

The estimated total water claim for the predevelopment PIA irrigation design in its current form is **25,070 afy**, which includes the water required for crops and vegetative windbreaks (Table 6). PIA land that overlapped the HIA or DCMI golf course land was included in the irrigation design but excluded in computing the water claim.

Table 6. Summary of Predevelopment PIA Irrigation Design Water Requirements.

Crop	Grapes	Lemons	Dates	Specialty Citrus	Mixed Veggies/Oats	Alfalfa / Potato	Total
Market Limits	2,000	1,300	700	100	500	700	6,300
Total Irrigated Acres	1,782	1,441	96	76	457	572	4,425
Productive Acres	1,573	1,257	96	71	446	567	4,010
Crop Irrigation Req. (AF)	7,375	4,400	549	248	2,198	3,355	18,125
Wind Break Irrigation Req. (AF)	1,221	1,076	0	31	67	33	2,427
Overall Crop Irrigation Efficiency (%)	80.8	80.8	80.8	80.8	85.5	85.5	
Overall Windbreak Irrigation Efficiency (%)	80.8	80.8	80.8	80.8	80.8	80.8	
Annual Total Diversion Req. (AF)	10,646	6,782	680	345	2,654	3,964	25,070
Annual Unit Area Diversion							
Req. (AF/acre)	5.97	4.71	7.07	4.54	5.80	6.93	
Estimated Depletion (AF)	8,902	5,681	572	288	2,297	3,469	21,211
Estimated Depletion (AF)	8,486	5,455	562	276	2,114	3,337	20,230

DOMESTIC, COMMERCIAL, MUNICIPAL, AND INDUSTRIAL WATER USE

The Agua Caliente Reservation's DCMI water supply is provided by two different agencies: the Coachella Valley Water District (CVWD) and the Desert Water Agency (DWA). Information provided by these two agencies can be used to determine both present and future water use rates on the Reservation.

Urban Water Management Plans

The Water Conservation Act of 2009 was enacted in California under Senate Bill X7-7 with the goal of reducing urban per-capita water use by 20% by the year 2020. All California urban water suppliers who supply over 3,000 afy or serve more than 3,000 urban connections are required to prepare and submit an Urban Water Management Plan (UWMP) every five years. Water suppliers were required to establish their baseline water use rate in the 2010 UWMP and to report their progress in reaching the 20% reduction in water use by 2020 in the 2015 UWMP.

2015 CVWD Urban Water Management Plan

For the purposes of complying with the mandated 20% reduction, CVWD selected a baseline period of 1999-2008, where the baseline water use rate was calculated as 606 gpcd (MWH 2016). This value was updated from the 2010 UWMP value, 591 gpcd, using 2010 U.S. Census data (MWH 2011). Although the baseline value increased, CVWD elected to keep its 2010-calculated 2020 target of 473 gpcd. CVWD reported actual urban per capita water use for 2015 at 383 gpcd, 37% lower than the 2015 interim target of 540 gpcd and 22% lower than the 2020 target (MWH 2016). CVWD used only the permanent population in determining the water use rates reported in its urban water management plan and stated that "incorporating the seasonal/transient population in the per capita water use calculations would reduce the per capita water use by about 20 percent" (MWH, 2016)

2015 DWA Urban Water Management Plan

DWA reported a baseline urban water use of 430 gpcd for the period of 1996-2005 in its 2015 UWMP. The 2015 interim target was calculated as 387 gpcd, and the 2020 target is 344 gpcd. Actual 2015 water use was reported as 271 gpcd, 30% lower than the interim target rate and 22% lower than the 2020 target (Krieger and Stewart 2016). DWA used both the permanent and seasonal/transient residents in its water use rate calculations.

Present DCMI Water Use Rate

The estimate of the present DCMI water use rate on the Agua Caliente Reservation is based on public supply system records. Water use records are available from the California State Water Resources Control Board (SWRCB) Urban Water Supplier Monitoring Reports (SWRCB, 2019). The SWRCB reports provides water use rates for residential and Commercial, Industrial, and Institutional (CII) water use sectors, which together represent total DCMI use. Table 7 shows the

DCMI water use rates for public water use within the CVWD and DWA service areas for the years 2015-2018.

Table 7. CVWD and DWA Water Use Rates for 2015-2018 (SWRCB, 2019)

Year	CVWD			DWA		
	Res	CII	Total	Res	CII	Total
2015	190	75	265	153	79	232
2016	189	75	265	157	74	231
2017	213	85	298	165	78	243
2018	216	86	302	168	83	251

The most recent complete year for which water use rates are available is 2018. The total DCMI water use rates for CVWD and DWA for this year are 302 gpcd and 251 gpcd, respectively. A GIS-based analysis determined CVWD and DWA serve 44% and 56%, respectively, of the developed areas on the Reservation. Therefore, the estimated present DCMI water use rate on the Reservation is $44\% \times 302 + 56\% \times 251 = 273 \text{ gpcd}$.

It should be noted that the 2015-2018 SWRCB reporting period overlaps with an extreme drought in the region and within California in general. Per capita water use during this period is markedly less than in preceding years and reflects both mandated and voluntary reductions. Both CVWD and DWA reported significantly higher water use for the baseline periods preceding the drought as summarized in the UWMPs.

The water use rates in the SWRCB reports are based on populations that include both permanent and seasonal/transient residents. This characteristic is important as this area of California (i.e., Palm Springs and the Coachella Valley in general) is home to many seasonal residents and attracts many visitors. The calculated water use rates would be significantly higher if only the permanent population base was used.

Present DCMI Water Use Estimate

The total present DCMI water use by tribal members on the Agua Caliente Reservation is estimated by multiplying the present water use rate by the total present tribal population. The present permanent Indian population is estimated to be 546 and the seasonal population is estimated to be 243. Therefore, the estimated total present DCMI water use is **241 afy**.¹

¹ Calculated as 273 gpcd * (546 + 243 people) * 365 d/yr * 1 af/325,851 gal = 241 afy

Future DCMI Water Use Rate

It is assumed that future water use on the Agua Caliente Reservation will reflect the future use rates of its water suppliers. As stated, the specified 2020 rates for CVWD and DWA are 473 gpcd and 344 gpcd, respectively. However, the CVWD rate is based on only the permanent population. In order to make it compatible with the DWA rate, the CVWD rate is reduced by 20% according to the estimate provided in the 2015 CVWD UWMP. Therefore, the 2020 CVWD rate is 378 gpcd.

Future Development Analysis

The ratio between CVWD and DWA service areas for the future claim is estimated based on an analysis of future developable lands. The future tribal population is expected to reside on currently undeveloped land for purposes of the DCMI claim so as not to overlap with other claim categories. Undeveloped land that is suitable for future DCMI development on the Reservation was identified through a GIS analysis assuming the following criteria:

- Presently undeveloped
- Not in a floodway
- Not being used for an irrigation claim (future or historic)
- Slope < 25%
- Mountainous parcels removed except where near existing services

This analysis resulted in 772 acres of developable land in CVWD's service area (13.6% of total) and 4,925 acres of developable land in DWA's service area (86.4% of total).

The future DCMI water use rate on the Agua Caliente Reservation is calculated by multiplying the future population distribution percentages by the target 2020 CVWD and DWA rates. The calculation is $13.6\% * 378 \text{ gpcd} + 86.4\% * 344 \text{ gpcd} = 349 \text{ gpcd}$.

Total Future DCMI Water Use Estimate

The total future DCMI water use on the Agua Caliente Reservation is estimated by multiplying the future weighted water use rate by the total future population. The future permanent Indian population is estimated to be 2,077 and the future seasonal population is estimated to be 924. Therefore, the estimated total future DCMI water use is **1,173 afy**.²

DCMI Present Golf Course Water Use Estimate

Water use for golf course irrigation is not part of the population based DCMI claim. This is because golf courses in the CVWD and DWA service areas are irrigated with non-potable recycled water and private well water and the reported per capita water use rates by the two agencies do not factor in these supplies. (Potable water use at golf courses is factored into the per capita rates.) Through GIS analysis it was determined there are 943 acres of land designated as golf courses on Agua

² Calculated as $349 \text{ gpcd} * (2,077 + 924 \text{ people}) * 365 \text{ d/yr} * 1 \text{ af}/325,851 \text{ gal} = 1,173 \text{ afy}$

Caliente Reservation trust lands, out of which approximately 886 appear to be irrigated or ponds based upon USGS (2019) imagery. The irrigation water duty is estimated at 6.8 afy/ac based on information reported by CVWD. Therefore, the total golf course irrigation claim is **6,025 afy**.

TOTAL WATER CLAIM

The total water claim is **33,608 afy** (Table 8).

Table 8. Water Claim Summary.

Claim Type		Water Claim (afy)
HIA		1,340
PIA		25,070
DCMI	-Population Based	1,173
	-Golf Courses	6,025
Total		33,608

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

AGUA CALIENTE BAND OF CAHUILLA INDIANS.

Plaintiff.

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor.

v.

COACHELLA VALLEY WATER
DISTRICT, et al.,
Defendants

CASE NO.
5:13-cv-00883-JGB-SP

[PROPOSED] ORDER

The portion of the Court's April 19, 2019 order that discusses the standing of the United States is:

WITHDRAWN

The Court will issue a new order on that issue.

IT IS SO ORDERED.

Dated this ____ day of _____, 2019

The Honorable Jesus G. Bernal
United States District Judge